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# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 84

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

C. W. BACON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

**PETITION FOR CERTIORARI FILED APRIL 17, 1930**
**CERTIORARI GRANTED MAY 26, 1930**

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1930

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A

[Caption omitted.]

1 In United States District Court Northern District of Texas

*Plaintiff's first amended original petition*

Filed June 25, 1928

*To the Honorable Wm. H. Atwell, Judge of said Court:*

Now comes C. W. Bacon, who will be hereinafter styled plaintiff, and, with leave of the court, files his first amended original petition in lieu of his original petition heretofore filed, and, complaining of George C. Hopkins, who will be hereinafter styled defendant, respectfully alleges:

2 I

The plaintiff is a citizen of the United States and of the State of Texas, and resides in Abilene, Taylor County, Texas, which is in the Abilene division of this court. The defendant is the duly appointed, qualified, and acting collector of internal revenue for the Second District of Texas and has held that office continuously since prior to 1927. He resides in Dallas, Dallas County, Texas, which is in the Dallas division of this court.

II

The acts and conduct on the part of the said defendant hereinafter complained of were done by him in his official capacity under instructions from his superior officers. There was probable cause for his conduct and he is entitled to a certificate of probable cause in the event judgment is rendered herein against him.

III

For cause of action plaintiff would show to the court that he married in the year 1894 and that he and his said wife have since that time continuously maintained the married relation and have continuously lived in the State of Texas and been citizens thereof since the date of his said marriage. Neither the plaintiff nor his said wife had any property at the date of their marriage and neither has since acquired any property by gift, devise, or descent, except the property given by the plaintiff to his wife as herein set forth.

3

IV

By their joint efforts the plaintiff and wife had accumulated, prior to the year 1927, a considerable amount of property, which consisted of real estate situated in the State of Texas, shares of the capital stocks of various Texas corporations, money, and funds loaned at interest. The properties so accumulated, plaintiff alleges and believes, were the community property of the plaintiff and his said wife under the laws of Texas.

V

In the year 1923 the plaintiff gave to his said wife, from the community property aforesaid, eighteen shares of the capital stock of the H. O. Wooten Grocery Company, a Texas corporation, and in the year 1925 likewise gave her six shares of the capital stock of the Abilene Building & Loan Association, and likewise, from time to time, gave her various sums of money, so that she had accumulated, from the portion of said gifts not expended by her, the sum of $500.00, which money she loaned at interest prior to the year 1927. The ownership of said property by the plaintiff's said wife was evidenced by certificate No. 38 for eighteen shares of the capital stock of the H. O. Wooten Grocery Company issued to the said Mrs. Bacon and in her name by the said company on March 14, 1923; by certificate No. 100 for six shares of the capital stock of the Abilene Building & Loan Association issued to the said Mrs. Bacon and in her name by said company on April 25, 1925; and the money

4 loaned at interest was evidenced by a promissory note payable to the said Mrs. Bacon, which loan was made in the year 1926.

VI

In the year 1927 the said Mrs. Bacon, wife of the plaintiff, received and collected from said property the following: A dividend from said stock in the H. O. Wooten Grocery Company of $242.00, a dividend from the said stock of the Abilene Building & Loan Association of $48.00, and interest upon said promissory note of $40.00.

VII

In the year 1927 the plaintiff herein was an officer and director in the Bacon Securities Company, a Texas corporation, and likewise the principal stockholder therein. He devoted the major portion of his time to the management of the affairs of said corporation and, in the year 1927, he received as a salary for the services so rendered in that year the sum of $3,600.00. He was likewise a director in other corporations and earned and received, as director's fees for services rendered such corporations as a director in 1927, the sum of $120.00.

## VIII

As the fruits and revenue of the community property aforesaid the plaintiff received, in the year 1927, the following sums:

| | |
|---|---|
| Interest | $9,261.77 |
| Rents on real estate | 5,312.18 |
| Dividends upon shares of stock in various corporations | 29,508.40 |
| Oil royalties | 78.50 |

He paid from community funds in the year 1927 the following sums, which he alleges constitute allowable and proper deductions in the calculation of net income under the revenue act of 1926:

| | |
|---|---|
| Interest | $2,173.51 |
| Taxes | 1,459.82 |
| Rental commissions | 900.00 |
| Auditor's fees | 612.88 |
| Charitable contributions | 845.00 |

In addition to this, proper allowance in the depletion on oil royalties in determining net income was $21.59. These expenses and deductions total $6,012.80.

## IX

The items above enumerated constitute all of the income received by either the plaintiff or his wife and all of the expenses and deductions allowable to either of them in the year 1927.

## X

The plaintiff and his wife each filed with the defendant, at the time required by law, income-tax returns for the year 1927 in a faithful and bona fide effort to report their said income and pay their income-tax liability thereon as required by the revenue act of 1926. In so doing each reported the entire amount of the interest and dividends so received by the said Mrs. Bacon the salaries and director's
6 fees received by the plaintiff, and the interest, rents, and royalties received as above set forth, and deducted therefrom the expenses and allowances above itemized, and each reported as net taxable income one-half of the remaining sum. The gross income so reported was $48,210.85. The deductions totaled $6,012.80, leaving a balance of $42,198.05, of which each reported one-half, or $21,099.03, as their respective net incomes.

## XI

The tax liability of the plaintiff and his wife upon the income as reported by them at the rates provided by the revenue act of 1926 was $336.25 each, and each of them has paid at the time required by law to the defendant one-fourth of said sums, the balance being due in installments which hereafter mature.

XII

After the plaintiff had filed his income-tax return for the year 1927 as above set forth, said return was audited and examined by the Commissioner of Internal Revenue, who determined that the plaintiff's said tax return was incorrect and that the tax liability shown therein insufficient in that, as determined by said Commissioner of Internal Revenue, all of said income—both that reported by the plaintiff and that reported by his wife—should have been reported by the plaintiff and the tax calculated at the rates provided for by the revenue act of 1926 upon one net income of $42,198.05 instead of two net incomes of $21,099.03 each. Said
7 commissioner notified the plaintiff by registered mail of this determination, in accordance with section 274 of the revenue act of 1926, and that he proposed to assess against him a deficiency in income tax for the year 1927 on account thereof amounting to $1,951.88.

XIII

The plaintiff waived the opportunity afforded him to appeal from said determination to the United States Board of Tax Appeals and thereafter, in May, 1928, the said sum, with interest in the sum of $23.69, a total of $1,975.57, was assessed against him by said commissioner and the assessment certified to the defendant for collection, who thereupon made formal notice and demand upon the plaintiff for the payment of said sum.

XIV

The plaintiff paid to the said defendant, on June 6, 1928, the sum so demanded of him and at the time of said payment protested in writing against the collection of said sum and notified the defendant that the said sum was paid only to avoid the imposition of further penalties and interest and the seizure and sale of his property, which would result if the said sum were not paid. Thereafter the plaintiff filed with the defendant a claim for the refunding of said sum in the manner required by law, which claim was based upon the facts and claims herein set forth and this claim was rejected by the Commissioner of Internal Revenue on, to wit, June 11th, 1928.

8 XV

Plaintiff would further show to the court that all of the income so reported by him and his wife for the year 1927 was their community income and property under the laws of the State of Texas and belonged jointly and equally to them and that he is not subject to taxation, under the revenue act of 1926, upon his said wife's one-half of said community income and that the action of the Commissioner of Internal Revenue in adding to the income so reported by him

the share of said community income received and reported by his wife was illegal and erroneous and likewise the assessment and collection of said additional sum as taxes and interest for the year 1927 was imporper, illegal, and erroneous and contrary to the terms and provisions of the revenue act of 1926.

## XVI

Plaintiff would further show to the court that the effect and result of the acts and conduct of the defendant, in demanding and collecting from him a tax upon his income plus that of his wife, is to levy and collect a tax upon something not within the meaning of the term "income" as it is used in the sixteenth amendment to to the Consitution of the United States. The major portion of the revenue so included was derived from real estate and invested personal property. The exaction so made of and from plaintiff is a direct tax, not upon income as that term is used in said sixteenth amendment, and is not apportioned among the several States in proportion to any census or enumeration. Therefore, the exaction and collection is in violation of the third clause of section 2 and the fourth clause of section 9 of Article I of the Constitution of the United States, as well as the sixteenth amendment thereto.

## XVII

Such exaction and collection was also in violation of section 8 of Article I and the fifth amendment to the Constitution.

## XVIII

The revenue act of 1926, if by its terms it provides for and requires that the income from the property of plaintiff and Mrs. Bacon be taxed in the manner and amount exacted of plaintiff by the Commissioner of Internal Revenue, is, as to this plaintiff, unconstitutional and void in that:

(a) It requires the collection from plaintiff of a tax based in whole or in part upon the income of Mrs. Bacon;

(b) It requires the collection from plaintiff at progressive rates of a tax based not upon his income alone, but upon the combined incomes of plaintiff and Mrs. Bacon, thereby not only obliging plaintiff to pay upon an income not his own, but obliging him to pay at a higher rate upon his own income;

(c) It forbids and prohibits plaintiff and Mrs. Bacon from filing separate income-tax returns including therein the income only belonging to and received by them respectively, which is allowed under the revenue act to citizens of other States;

(d) It levies a direct tax upon the real estate and invested personal property owned by plaintiff and Mrs Bacon and the fruits and revenues therefrom, which direct tax is not upon income as the

term is used in the sixteenth amendment to the Constitution, and which is not apportioned among the several States upon the basis of any census or enumeration, and it is also arbitrary and capricious in that it uses as a basis and as the subject of a tax assessed against and collected from plaintiff at progressive rates the combined incomes of himself and Mrs. Bacon of the income only of plaintiff;

(e) It provides for the taking of the property of the plaintiff without due process of law and denies to him the equal protection of the law; and in all of which respects and particulars, as well as in other respects and particulars, violates the third clause of section 2, the first clause of section 8, the fourth clause of section 9, all of Article I of the Constitution of the United States, as well as the fifth and sixteenth amendments to the Constitution of the United States.

XIX

Because of the facts herein alleged, plaintiff is entitled to have and recover from the defendant the taxes and interest so paid, together with interest thereon, as provided by law.

11 Wherefore, premises considered, plaintiff sues, prays for the issuance of citation to the defendant, and that upon final hearing hereof he have judgment against defendant for the taxes and interest so paid, amounting to $1,975.57, together with interest thereon from the date of payment at the rate of 6% per annum, and all costs of suit; that there be issued by the court a certificate of probable cause for the conduct of defendant in his official capacity as aforesaid; and that plaintiff have such other and further relief as he may be entitled to.

THOMPSON, KNIGHT, BAKER & HARRIS,
BAKER, BOTTS, PARKER & GARWOOD,
PALMER HUTCESON,
FULBRIGHT, CROCKER & FREEMAN,
HARRY A. WEEKS,
*Attorneys for Plaintiff.*

In United States District Court

12 *Defendant's original answer*

Filed June 25, 1928

*To the Honorable Wm. H. Atwell, Judge of said Court:*

Comes now the defendant, George C. Hopkins, collector of internal revenue, by his counsel and for demurrer and answer to the plaintiff's first amended original petition herein, pleads and shows to the court as follows:

I

The defendant demurs to the said petition and the several allegations made therein and says the same are insufficient in law and show

no cause of action or right to recover against him in any sum, and of this he prays the judgment of the court.

II

If required, for answer herein, the defendant denies all and singular the allegations in said petition contained, and demands strict proof thereof, and says he is not guilty of the wrongs and trespasses, or of any of them, therein alleged against him, and to this he puts himself upon the country and prays to be adjudged to go hence without day with his costs.

NORMAN A. DODGE,
*United States Attorney,*
*Attorney for Defendant.*
THOS. H. LEWIS, Jr.,
*Special Attorney, Bureau of Internal Revenue,*
*Of Counsel for Defendant.*

13 In United States District Court

*Special findings of fact*

Filed June 25, 1928

The parties before trial of this cause having made and duly filed stipulation in writing waiving trial by jury, and defendant having appropriately requested special findings of the facts, the court makes and files the following findings of the facts as a part of the primary record upon which the judgment rendered in this cause is based, which special findings shall be filed herein as of June 25, 1928, to wit:

I

Plaintiff, C. W. Bacon, since prior to 1894 has been and is now a citizen of the United States and of the State of Texas, residing in Taylor County, Texas, within the second internal revenue collection district of Texas, and the defendant, George C. Hopkins, was and is the duly qualified and acting collector of the United States for said district since prior to the year 1927, residing in Dallas County, Texas.

II

Plaintiff is and since the year 1894 has been married, during all of which time he and wife, Mrs. C. W. Bacon, have lived together in Texas, and Mrs. Bacon during that period has been and is now a citizen of said State and of the United States.

III

14 Plaintiff's said wife prior to and throughout the year 1927 owned and had possession of the following separate property, the record title to which stood in her name:

18 shares of the capital stock of the H. O. Wooten Grocery Company, a Texas corporation;

6 shares of the capital stock of the Abilene Building & Loan Association, a Texas corporation;

A promissory note for $500.00 bearing 8% interest per annum.

IV

All other property owned by the plaintiff and his said wife, or either of them, prior to and during the year 1927 was their community property under the laws of Texas, and the record titles thereto stood in the name of plaintiff. Said community property consisted of real estate located in Texas, shares of stock in Texas corporations, and in interests in oil, gas, and other minerals in lands situated in Texas and moneys loaned at interest evidenced by promissory notes.

V

The gross income of plaintiff and his wife for the year 1927 was as follows:

(a) $330.00 from the separate property aforesaid of Mrs. Bacon, paid to and received by her; and,

(b) $47,880.85 from the community property aforesaid, paid to and received by plaintiff.

15 Allowable deductions from gross income for said year under the revenue act of 1926 totalled $6,012.80, thus leaving net income subject to taxation before deducting personal exemptions and earned income credit of $42,198.05. None of said income is revenue from homestead property.

VI

Plaintiff and his wife filed separate income-tax returns for the year 1927 in due course, in which they included under proper headings the income and deductions above described; plaintiff in his said return reported one-half of said net income, to wit, $21,099.02, and his said wife reported in her return one-half thereof, and each deducted $1,750.00 (one-half of personal exemption) and the correct earned income credit. The tax liability of plaintiff reported in his return was $336.25 and the tax liability of Mrs. Bacon reported in her return was a like sum. Plaintiff on or before March 15, 1928, paid to the defendant out of community funds one-fourth of the tax reported in his said return. If plaintiff and his wife were entitled to divide income less deductions, exemptions, and credits, their returns were correct and the tax liability of each of them was $336.25 for said year 1927.

## VII

The Commissioner of Internal Revenue audited plaintiff's said return for 1927 and determined the same was incorrect in that plaintiff should have reported all of said income and claimed all of said
16 deductions; and plaintiff's wife should have reported none of same; and that the tax should be computed and paid at the rates provided in the revenue act of 1926 upon a net income of $42,198.05 instead of upon two net incomes of one-half said sum. Upon such basis the tax liability of plaintiff for said year would be $1,951.88 in addition to the amount reported on his return, or a total of $2,288.13. The commissioner notified plaintiff of this determination in accordance with law, and plaintiff was afforded opportunity to appeal to the United States Board of Tax Appeals, but waived such right without prejudice to his right to test the matter in the courts, whereupon, the Commissioner in May, 1928, assessed against the plaintiff said additional sum of $1,951.88 as a deficiency tax due for the year 1927 and interest in the sum of $23.69, a total of $1,975.57. Said assessment was duly certified to defendant, who, on May 31, 1928, made formal notice and demand upon plaintiff for payment, and the amount so demanded was paid by the plaintiff to the defendant on June 6, 1928, under protest and to avoid penalties, additional interest, and seizure and sale of property.

## VIII

In June, 1928, the plaintiff filed proper claim for refund of said sum, which claim was duly rejected by the Commissioner of Internal Revenue, and this suit was thereafter filed. Plaintiff has complied with all conditions precedent and formal requirements for the prosecution of this suit upon the allegations made in
17 his amended petition, and the court has jurisdiction of the parties and the subject matter herein.

## IX

The taxes and interest sued for herein were collected by defendant in manner and form provided by applicable law and regulations, and there was probable cause for said collection and the defendant is entitled to a certificate of probable cause.

## X

The stipulation of facts filed by the parties in this cause is hereby adopted by the court as the findings of all other facts.

WM. H. ATWELL.
*United States District Judge.*

In United States District Court

*Stipulation and statement of facts*

Filed June 25, 1928

The parties to this proceeding, each acting by and through his attorneys of record, hereby stipulate and agree as follows:

I

Both parties hereby expressly waive a jury and their right to a trial by jury in this case.

II

Both parties admit and agree that the following are true
18 statements of the pertinent facts in this case and this case shall be submitted upon the same as an agreed and admitted statement of facts.

(a) C. W. Bacon, the plaintiff, since prior to 1894, has been and now is a citizen of the United States and of the State of Texas and has resided and now resides in Abilene, Taylor County, Texas in the collection district for the collection of internal revenue of the United States known as the second district of Texas.

(b) George C. Hopkins, the defendant, is the duly appointed, qualified, and acting collector of internal revenue of the United States for said second district of Texas and has been such continuously since prior to the year 1927, and throughout that period and now he has resided and now resides in Dallas, Dallas County, Texas.

(c) Taylor County, Texas, and Dallas County, Texas, both are in the district for the collection of internal revenue of the United States known as the second district of Texas, and also are in the judicial district of the United States known as the northern district of Texas.

(d) The taxes and interest sued for in this proceeding were paid by plaintiff to defendant in defendant's official capacity. His action in demanding and collecting such taxes and interest was in accordance with the instructions of his superior officers, duly appointed, qualified and acting. There was probable cause for this action
19 on his part, and in the event of a decision in this case adverse to him he is entitled to a certificate of probable cause.

(e) The plaintiff married his present wife in the year 1894. He and his said wife have maintained the marriage relation continuously since that time, during all of which they have lived together in the State of Texas. Mrs. Bacon, throughout such period and now, has been and is a citizen of the United States and of the State of Texas.

(f) Mrs. C. W. Bacon, the wife of plaintiff, prior to and throughout the year 1927, owned and had possession of the following separate property, the record title to which stood in her name:

1. Eighteen (18) shares of the capital stock of the H. O. Wooten Grocery Company, a Texas corporation.

2. Six (6) shares of the capital stock of the Abilene Building & Loan Association, a Texas corporation.

3. A promissory note in the principal sum of five hudred dollars ($500.00), bearing interest at the rate of eight per cent (8%) per annum.

The H. O. Wooten Grocery Company stock was given to Mrs. Bacon by her husband, the plaintiff, from community property in the year 1923. Her ownership is evidenced by certificate No. 38, issued to her and in her name by that company on March 14, 1923.

20 The Abilene Building & Loan Association stock was given to Mrs. Bacon by her husband, the plaintiff, from community property in the year 1925. Her ownship is evidenced by certificate No. 100, issued to her and in her name by that association on April 25, 1925. The promissory note is payable to her and represents a loan made by her out of money, her separate property, given to her by her husband, the plaintiff, out of community funds prior to the year 1927.

(g) All other property owned by the plaintiff and his said wife, or either of them, prior to or during the year 1927 was their community property under the laws of Texas, and the record title thereto stood in the name of plaintiff. With the exception of gifts from plaintiff to Mrs. Bacon outlined in subdivision (f) above, neither plaintiff nor his wife ever acquired any property by gift, devise, or descent, and neither of them had any property at the time of their marriage. All said community property prior to and throughout the year 1927 consisted of real estate located in Texas, shares of stock in Texas corporations, and interest in the oil, gas, and other minerals in and under lands in Texas termed an oil royalty and money loaned at interest, which loans were evidenced by promissory notes.

(h) The entire gross income in and for the year 1927 of plaintiff and his wife, and each of them, which was taxable under the revenue laws of the United States was as follows:

| | | |
|---|---|---|
| 21 1. Interest from the loan of community funds as aforesaid | $9,261.77 | |
| 2. Interest from the loan of separate funds of Mrs. Bacon as aforesaid | 40.00 | |
| Total interest | | $9,301.77 |
| 3. Dividends from shares of capital stock of the corporations, which shares were community property as aforesaid | $29,508.40 | |
| 4. Dividends from shares of capital stock of Texas corporations, which shares were the separate property of Mrs. Bacon as aforesaid | 290.00 | |
| Total dividends | | $29,798.40 |

| | |
|---|---|
| 5. Rents from the leasing of real estate in Texas, which real estate was community property as aforesaid | $5,312.18 |
| 6. Royalties from oil produced from real estate in Texas, which real estate was community property as aforesaid | 78.50 |
| 7. Plaintiff was an officer and director in Bacon Securities Company, a Texas corporation, and prior to and throughout the year 1927 owned about 60% of the stock in that corporation. He devoted the major portion of his time in the year 1927 to its affairs and from it received in the year 1927 a salary for his services in that year of | 3,600.00 |
| 8. Plaintiff was a director in that and other corporations in that year and earned in that year, as director's fees, for his services in attending upon meetings of board of directors of such corporations, the sum of | 120.00 |
| Total gross income | $48,210.85 |

(i) Included in the dividends and interest in the foregoing schedule of income are the dividends and interest which were paid Mrs. Bacon upon her separate property mentioned above. In 1927 she was paid, as dividend upon her stock in the H. O. Wooten Grocery Company, $242.00; upon her stock in the Abilene Building & Loan Association $48.00, making total dividends of $290.00, and as interest upon her promissory note, $40.00. These moneys were all paid to her.

(j) Plaintiff paid from the community funds, in the year 1927, the following, which constitute allowable deductions from gross income for the year 1927 under the revenue act of 1926:

| | |
|---|---|
| Interest | $2,173.51 |
| Taxes | 1,459.82 |
| Rental commissions | 900.00 |
| Auditor's and accounting fees | 612.88 |
| Depletion through oil withdrawals | 21.59 |
| Contributions | 845.00 |
| Total deductions | $6,012.80 |
| Net income subject to taxation before deducting personal exemptions and earned income credit | $42,198.05 |

(k) Plaintiff and his wife each filed separate income-tax return with the defendant for the year 1927; they were filed in due course; the defendant was the proper collector with whom the same should have been filed; they were on Form 1040, furnished to taxpayers by the Bureau of Internal Revenue: copies of these returns are attached hereto as Exhibits "A" and "B," respectively, and are made part hereof for all purposes; in each return there were included, under proper headings, the revenues above described (derived from community property and from the separate property of Mrs. Bacon), which totaled $48,210.85, from which there was subtracted the deductions above itemized, totaling $6,012.80, leaving a net amount of $42,198.05 before deducting personal exemptions and earned income credit. From the said sum of $42,198.05 the plaintiff in his return deducted amounts as follows: One-half of total $21,099.02, because reported and paid on by Mrs. Bacon; one-half of personal exemption of $1,750.00, and earned income credit in small but correct amount. The tax liability of plaintiff as shown by his said return was $336.25.

The tax liability of Mrs. Bacon was arrived at in the same manner, was based on the same figures, and was $336.25. Plaintiff, on or before March 15, 1928, paid to the defendant out of community funds one-fourth of said taxes disclosed upon his returns
24 herein described. If plaintiff and his wife were entitled to divide income less deductions, exemptions, and credits, as above described, their returns were correct and the tax liability of each of them thereon was $336.25.

(l) Upon auditing the said tax return for 1927, filed by the plaintiff, the Commissioner of Internal Revenue determined that the same was incorrect in that, according to the determination of the commissioner, the plaintiff should have reported all of said income and claimed all of said deductions, and the plaintiff's wife should have reported none of same, and the tax should be computed and paid at the rates provided in the revenue act of 1926 upon a net income of $42,198.05, instead of upon two net incomes of one-half of said sum. Under such a theory the tax liability of the plaintiff for 1927 would be $1,951.88, in addition to the amount shown on said return, or a total of $2,288.13. The Commissioner of Internal Revenue notified plaintiff of this determination in accordance with the provisions of section 274 of the revenue act of 1926, and afforded the plaintiff an opportunity to appeal from this determination to the United States Board of Tax Appeals. The plaintiff waived this right, but without prejudice to his right to test the matter in the courts; whereupon the Commissioner of Internal Revenue assessed against the plaintiff in May, 1928, said additional sum of $1,951.88, as a deficiency in income tax due by him for the year 1927, and interest in the sum of $23.69, a total of $1,975.57. Said assessment was certified to the
25 defendant who, upon May 31, 1928, made formal notice and demand upon the plaintiff for the payment of said sum. A copy of the notice of the determination of a deficiency mailed by the Commissioner of Internal Revenue to the plaintiff, as above set forth, is attached hereto and marked "Exhibit C" and hereby made part hereof for all purposes.

(m) The amount so demanded by the defendant from the plaintiff was paid by the plaintiff to the defendant on June 6, 1928. This payment was made under protest and in order to avoid the penalties, additional interest, and seizure and sale of property which would ensue if the demand had not been complied with.

(n) On June , 1928, the plaintiff filed with the defendant a claim for the refunding of said sum. A copy of this claim is hereto attached, marked "Exhibit D," and hereby made a part hereof for all purposes. This claim was rejected by the Commissioner of Internal Revenue on June , 1928, whereupon this suit was instituted.

(o) The plaintiff has complied with all of the conditions precedent, and other formal requirements of the statutes and rules relating to this right to institute and prosecute this suit in the manner and upon the grounds alleged in his pleadings herein, and

all informalities, if any, are waived. The defendant and the other officers of the United States have complied with all formal
26 requirements of the statutes and regulations in making the deficiency assessments, in collecting the same, and in rejecting plaintiff's claim for refund.

III

It is further agreed that upon trial of this cause either party hereto may specify for the record, or introduce in evidence, copies of any or all of the documents or proceedings described and referred to in Exhibit E, hereto attached and made a part hereof, subject to all legal objections offered by any other party except that of proof of execution, certification, and or proof of authenticity, all of which are hereby waived; but nothing in this stipulation shall be considered as a limitation upon the right of the court to take judicial notice of such matters as under the law may properly be made the subject of such judicial notice.

IV

Upon the trial of this cause, either party hereto may offer any such additional evidence as may be considered by such party to be pertinent, subject to all legal objections by any other party.

V

This agreement and stipulation shall, upon its execution, be filed in this cause and become a part of the record in the same.
27 In witness whereof the attorneys of record of the respective parties have executed this agreement this 25th day of June, A. D. 1928.

BAKER, BOTTS, PARKER & GARWOOD,
THOMPSON, KNIGHT, BAKER & HARRIS,
FULBRIGHT, CROOKER & FREEMAN,
WEEKS, MORROW, FRANCES & HANKERSON,
*Attorneys for Plaintiff.*
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THOS. H. LEWIS, Jr.,
*Attorneys for Defendant.*

*Exhibit E to stipulation and statement of facts*

List of documents referred to in Paragraph III of the attached agreement.

1. Excerpts from the following proceedings before the Sixty-sixth Congress on the revenue act of 1921 in so far as same refer to the subject of community income or proposed legislation with respect thereto:

(a) Bill as originally introduced.

(b) Bill as reported by the Ways and Means Committee of the House of Representatives.

(c) Bill as adopted by the House of Representatives.

(d) Bill as reported by the Finance Committee of the Senate.

(e) Report of the Finance Committee to the Senate.

28 (f) Debate and discussion on the floor of the Senate, as disclosed by the Congressional Record.

(g) Bill as adopted by the Senate.

(h) Bill as finally enacted.

2. Excerpts from the following proceedings before the Sixty-eighth Congress on the revenue act of 1924 in so far as same refer to the subject of community income or proposed legislation with respect thereto:

(a) Bill as originally introduced.

(b) Printed proceedings before Ways and Means Committee.

(c) Bill as reported by the Ways and Means Committee of the House of Representatives.

(d) Proceedings shown in the Congressional Record.

3. Excerpts from proceedings before the Sixty-ninth Congress in so far as the same refer to community income or legislation with respect thereto:

(a) Amendment to H. R. No. 1 submitted by Senator Wesley M. Jones, of the State of Washington, on the floor of the Senate on February 25, 1926.

(b) Section 1212 of H. R. No. 1, as adopted by the Senate on February 25, 1926.

(c) Report of the conferees upon H. R. No. 1.

Documentary evidence introduced by counsel for plaintiff under provisions of Exhibit E in stipulation filed in the above cause:

29 1. (a) The following clause was included in the revenue act of 1921 as introduced in the House of Representatives.

"Income received by any community shall be included in the gross income of the spouse having the management and control of the community property."

(b) The bill as reported by the Ways and Means Committee of the House contained the same clause copied under subdivision (a).

(c) The bill as passed by the House of Representatives contained the same clause as is copied under subdivision (a).

(d) The revenue act of 1921 as reported by the Finance Committee to the Senate substituted for the clause shown in subdivision (a) above the following clause:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

(e) In making its report to the Senate the Finance Committee discussed the foregoing provisions in the following language, as shown at page 14 of its report:

"Under an opinion of the attorney general, residents of States having a community property law enjoyed marked advantages over residents of other States. Income which in other States is taxes as a unit to the husband is divided between husband and wife in
States having community property laws, and the surtaxes are
30 correspondingly reduced. An amendment is added to this
section designed to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

(f) In view of the ruling of the court evidence preferred under subdivision (f) is withdrawn.

(g) The bill as adopted by the Senate eliminated the provision shown under subdivision (d) above.

(h) The bill as finally enacted contained no specific reference to community income.

2. (a) In committee print No. 1 of the revenue act of 1924 as introduced in the Sixty-eighth Congress and filed on December 17, 1923, was entitled as follows:

"The revenue act of 1924, containing proposed amendments to the existing law suggested by the Secretary of the Treasury."

At page 58 of the bill there was included what was described as new matter the following provision:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

(b) In view of the objections made by counsel for defendant the evidence proffered under subdivision (b) hereof is hereby withdrawn.

31 (c) The bill as reported by the Ways & Means Committee to the House of Representative eliminated the provisions shown under subdivision (a) hereof and contained no reference to the community income.

(d) In view of the ruling of the court the evidence proffered under subdivision (d) hereof is hereby withdrawn.

3. (a) The Senate amendment No. 204 to the revenue act of 1926, as originally passed by the House, read as follows:

"Retroactive regulations—Sec. 1213. The liability of any taxpayer under any internal revenue law shall be determined (unless such taxpayer otherwise consents or requests) in accordance with the Treasury decisions, opinions of the Attorney General and regulations made by the commissioner or by the Secretary, or by the commissioner with the approval of the Secretary, in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision, the

term 'return' means, in the case of a return which has been amended, the return as finally amended."

(b) A conference report, No. 356, reflects the following proceedings agreed to by the conference committees of the House and Senate (page 29):

"Amendment numbered 204.

"That the House recede from its disagreement to the amendment of the Senate numbered 204, and agree to the same with an amendment as follows:

"In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

32 Community property

"'SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse and a period.'

"And the Senate agree to the same."

(c) The recommendation of the conference committees as above reflected was adopted by the Senate and House.

(d) As a part of the conference report there was attached a "Statement of the managers on the part of the House." It contained the following language (pages 59–60):

"Amendment No. 204. This amendment was intended to provide for retroactive validation of all Treasury decisions, opinions of the Attorney General, and regulations of the Treasury Department made under prior revenue acts; it provided that the liability of any taxpayer under any internal revenue law should be determined in accordance with the Treasury decision, opinion of the Attorney General, and Treasury regulations in force at the time the taxpayers' return was made. The House recedes with an amendment striking out the Senate provision, and inserting a section providing
33–34 that income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. The section as agreed to also provides that any spouse who elects so to return such income shall not be entitled to refund on the ground that such income should have been returned by the other spouse."

UNITED STATES OF AMERICA

*Exhibit A to stipulation and statement of facts*

TREASURY DEPARTMENT,
*Washington, August 2, 1928.*

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of individual income tax return for 1927, filed by C. W. Bacon, Abilene, Texas, the originals of which are on file in this department.

In witness whereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

By direction of the Secretary.

[SEAL.] F. A. BIRGFELD,
*Chief Clerk, Treasury Department.*

39–40 UNITED STATES OF AMERICA

*Exhibit B to stipulation and statement of facts*

TREASURY DEPARTMENT,
*Washington, August 2, 1928.*

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of individual income tax return for 1927, filed by Mrs. C. W. Bacon, Abilene, Texas, the originals of which are on file in this department.

In witness whereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

By direction of the Secretary.

[SEAL.] F. A. BIRGFELD,
*Chief Clerk, Treasury Department.*

45–46 OFFICE OF COMMISSIONER OF INTERNAL REVENUE

TREASURY DEPARTMENT,
*Washington, May 9, 1928.*

Mr. C. W. BACON,
*Abilene, Texas.*

SIR: In accordance with section 274 of the revenue act of 1926 you are advised that the determination of your tax liability for the year 1927 discloses a deficiency of $1,951.88, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and

3 Computation

Form 1040
U. S. INTERNAL REVENUE
(Auditor's Stamp)

ACCEPTED 6-28

# INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
OR INCOMES, REGARDLESS OF AMOUNT, FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

## For Calendar Year 1927

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1928

Do Not Write in These Spaces

File Code 32

Serial Number 300422
(Cashier's Stamp)

ACCEPTED
WED
HAN
1928

(PRINT NAME AND ADDRESS PLAINLY BELOW)

C. W. BACON
(Name)

2-724
(Street and number, or rural route)

ABILENE, TEXAS
(Post office) (County) (State)

Cash Check M. O. Cert. of Dep.
First Payment
$ 84.07
Carded

Occupation, Profession, or Business As

1. Are you a citizen or resident of the United States? YES
2. If you filed a return for 1926, to what Collector's office was it sent? DALLAS
3. Is this a joint return of husband and wife? NO - COMMUNITY
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent MRS. C.W. BACON, SAME ADDRESS
5. Were you married and living with husband or wife on the last day of your taxable year? YES
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change.
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? NONE

44

| Item and Instruction No. | INCOME | Amount received | Expenses paid (Explain in Schedule F) | | | | |
|---|---|---|---|---|---|---|---|
| 7 | 1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received) Bacon Securities Co., Abilene, Texas | $ | $ | $ | 3 | 600 | 00 |
| | Directors Fees | | | | | 120 | 00 |
| | | | | | | | |
| 20 | 2. Income from Business or Profession. (From Schedule A) | | | | | | |
| | 3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source) | | | | 9 | 301 | 77 |
| | (a) Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source | | | | | | |
| | 4. Income from Partnerships. (State name and address) | | | | | | |
| | | | | | | | |
| | (c) Income from Fiduciaries. (State name and address) | | | | | | |
| | | | | | | | |
| | 5. Rents and Royalties. (From Schedule B) | | | | 5 | 312 | 18 |
| | 6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C) | | | | | | |
| | 7. Dividends on Stock of Domestic Corporations | | | | 29 | 798 | 40 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 8. Taxable Interest on Liberty Bonds, etc. (From Schedule F) | | | | | | | | | | |
| 9. Other Income (including dividends received on stock of foreign corporations). (State source of income) | | | | | | | | | | |
| (a) Oil Royalties | | | | | | | 78 | 50 | | |
| (b) | | | | | | | | | | |
| 10. TOTAL INCOME IN ITEMS 1 TO 9 | | | | | | | | | $ 48 | 210 85 |
| **DEDUCTIONS** | | | | | | | | | | |
| 11. Interest Paid | | | | | | | 173 | 51 | | |
| 12. Taxes Paid. (Explain in Schedule F) | | | | | | | 1 459 | 88 | | |
| 13. [redacted] Rental Commissions Paid | | | | | | | 900 | 00 | | |
| 14. [redacted] Auditors for defending Income Tax Case | | | | | | | 612 | 88 | | |
| 15. Contributions. (Explain in Schedule F) | | | | | | | 845 | 00 | | |
| 16. Other Deductions Authorized by Law. (Explain in Schedule F) Depletion on Oil Royalties | | | | | | | 21 | 59 | | |
| 17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16 | | | | | | | | | $ 6 012 | 80 |
| 18. NET INCOME (Item 10 minus Item 17) | | | | | | | | | $ 42 198 05 / 21 099 02 | |
| | | | | | | | | | $ 21,099.03 | |

**COMPUTATION OF TAX** (See Instruction 21)

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 19. Earned Net Income (not over $20,000) | $5,000 | 00 | 31. Net Income (Item 18 above) | $21,099 | 03 | 42. Normal Tax (1½% of Item 38) | $ 60 | 00 |
| 20. Less Personal Exemption and Credit for Dependents (see Instruction 20) | 1,750 | 00 | 32. Less Dividends (Item 7 above) | $4899 | 20 | 43. Normal Tax (3% of Item 40) | 13 | 49 |
| 21. Balance (Item 19 minus 20) | $3,250 | 00 | 33. Interest on Liberty Bonds, etc. (Item 8) | | | 44. Normal Tax (5% of Item 41) | | |
| 22. Amount taxable at 1½% (not over the first $4,000 of Item 21) | $3,250 | 00 | 34. Personal Exemption | 1750 | 00 | 45. Surtax on Item 18 (see Instruction 21) | 274 | 95 |
| 23. Amount taxable at 3% (not over the second $4,000 of Item 21) | -o- | | 35. Credit for Dependents | | | 46. Tax on Net Income (total of Items 42, 43, 44, and 45) | $ 348 | 44 |
| 24. Amount taxable at 5% (balance over $8,000 of Item 21) | | | 36. Total of Items 32, 33, 34, and 35 | 16,649 | 20 | 47. Less Credit of 25% of Tax on Earned Net Income (Item 30) | 12 | 19 |
| 25. Normal Tax (1½% of Item 22) | $ 48 | 75 | 37. Balance (Item 31 minus 36) | $ 4,449 | 83 | 48. Balance (Item 46 minus 47) | $ 336 | 25 |
| 26. Normal Tax (3% of Item 23) | | | 38. Amount taxable at 1½% (not over the first $4,000 of Item 37) | 4,000 | 00 | 49. Adjustment for Capital Gain or Loss (12½% of Column 9, Schedule D) | | |
| 27. Normal Tax (5% of Item 24) | | | 39. Balance (Item 37 minus 38) | $ 449 | 83 | 50. Total Tax (total of or difference between Items 48 and 49) | $ | |
| 28. Surtax on Item 19 (see Instruction 21) | | | 40. Amount taxable at 3% (not over the second $4,000 of Item 37) | 449 | 83 | 51. Less Income Tax Paid at Source | | |
| 29. Tax on Earned Net Income (total of Items 25, 26, 27, and 28) | $ 48 | 75 | 41. Amount taxable at 5% (balance over $8,000 of Item 37) | $ -o- | | 52. Income and Profits Taxes paid to a foreign country or U. S. possession | | |
| 30. Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43, and 44) | $ 12 | 19 | | | | 53. Balance of Tax (Item 50 minus Items 51 and 52) | $ 336 | 25 |

**AFFIDAVIT**

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1926, and the Regulations issued under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 2d day of March, 1928.

NOTARIAL SEAL

A. M. Boyd Jr. (Signature of officer administering oath) , Notary Public (Title)

O. W. Dobson (Signature of individual or agent)

Abilene Texas (Address of agent)

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par

a1

## SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 2)

1. Total receipts from business or profession (state kind of business) ..... $

**Cost of Goods Sold**

2. Labor ..... $
3. Material and supplies .....
4. Merchandise bought for sale .....
5. Other costs (itemize below or on separate sheet) .....
6. Plus inventory at beginning of year .....
7. Total (Lines 2 to 6, inclusive) ..... $
8. Less inventory at end of year .....
9. Net Cost of Goods Sold (Line 7 minus Line 8) ..... $

Note.—Do not deduct here or elsewhere compensation for your services

**Other Business Deductions**

10. Salaries, exclusive of "Labor," reported on Line 2, and exclusive of compensation for your services ..... $
11. Interest on business indebtedness to others .....
12. Taxes on business and business property .....
13. Losses by fire, storm, etc. (explain in table provided therefor at foot of page) .....
14. Bad debts arising from sales or services .....
15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page) .....
16. Rent, repairs, and other expenses (itemized below or on separate sheet) .....
17. Total (Lines 10 to 16, inclusive) ..... $
18. Total Deductions (Line 9 plus Line 17) ..... $
19. Net Profit (Line 1 minus Line 18) (Enter as Item 2) ..... $

Explanation of deductions claimed on Lines 5 and 16 .....

## SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

| 1. Kind of Property | 2. Amount Received | 3. Cost | 4. Value as of March 1, 1913 | 5. Depreciation (Explain in table at foot of page) | 6. Repairs | 7. Other Expenses (Itemize below) | 8. Net Profit (Enter as Item 5) |
|---|---|---|---|---|---|---|---|
| Abilene Candy Co. Bldg. | $ 3,600 00 | $ 19,000 00 | $ -0- | $ 760 00 | $ | $ 193 50 | $ 2,646 50 |
| Bldg. on Lot 7 & 8 Pine St. | 1,968 75 | 7,500 00 | -0- | 215 00 | | 215 25 | 1,538 50 |
| Morse Bldg. | 2,087 50 | 20,000.00 | -0- | 600 00 | | 360 32 | 1,127 18 |
| | $ 7,656 25 | | | $ 1,575 00 | | $ 769 07 | $ 5,312 18 |

Explanation of deductions claimed in Column 7 .....

## SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

| 1. Kind of Property | 2. Date Acquired | 3. Amount Received | 4. Depreciation Allowable Since Acquisition | 5. Cost | 6. Value as of March 1, 1913 | 7. Subsequent Improvements | 8. Net Profit (Enter as Item 6) |
|---|---|---|---|---|---|---|---|
| | | $ | $ | $ | $ | $ | $ |
| | | | | | | | |
| | | | | | | | |

State how property was acquired .....

## SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

| 1. Kind of Property | 2. Date Acquired | 3. Date Sold | 4. Amount Received | 5. Depreciation Allowable Since Acquisition | 6. Cost | 7. Value as of March 1, 1913 | 8. Subsequent Improvements, and Capital Deductions | 9. Net Gain or Loss (Enter 12½% as Item 49) |
|---|---|---|---|---|---|---|---|---|
| | *Mo. Day Year* | *Mo. Day Year* | $ | $ | $ | $ | $ | $ |
| | | | | | | | | |
| | | | | | | | | |

State how property was acquired .....

## SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

| 1. Obligations or Securities | 2. Interest Received or Accrued | 3. Amount Owned | 4. Principal Amount Exempt From Taxation | 5. Amount Owned in Excess of Exemption | 6. Interest on Amount in Excess of Exemption (Enter as Item 8) |
|---|---|---|---|---|---|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia | $ | $ | All | XXXXXX XX | XXXXXX XX |
| (b) Securities issued under Federal Farm Loan Act, or under such Act as Amended | | | All | XXXXXX XX | XXXXXX XX |
| (c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possessions of the United States | | | All | XXXXXX XX | XXXXXX XX |
| (d) Liberty 4% and 4¼% Bonds, Treasury 3⅛%, 3¾%, 4%, and 4¼% Bonds, Treasury Certificates of Indebtedness, and Treasury (War) Savings Certificates | | | $5,000 | $ | $ |
| (e) Treasury Notes | | | None | | |

## SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

Schedule B - Item 7:

| | | |
|---|---|---|
| Insurance | $ 463.87 | |
| Repairs | 215.25 | |
| Janitor Service | 89.95 | $ 769.07 |

Donations:

Boy Scouts $25.00, Salvation Army $20.00, Welfare Association $25.00
Orphans Home $25.00, First Christian Church $750.00

## EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. Kind of Property (If buildings, state material of which constructed) | 2. Date Acquired | 3. Age When Acquired | 4. Probable Life After Acquirement | 5. Cost (Exclusive of Land) | 6. Value as of March 1, 1913 (Exclusive of Land) | Amount of Depreciation Charged Off | |
|---|---|---|---|---|---|---|---|
| | | | | | | 7. Previous years | 8. This year |
| | | | | $ | $ | $ | $ |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

## EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

| 1. Kind of Property | 2. Date Acquired | 3. Cost | 4. Value as of March 1, 1913 | 5. Subsequent Improvements | 6. Depreciation Allowable Since Acquisition | 7. Insurance and Salvage Value | 8. Deductible Loss |
|---|---|---|---|---|---|---|---|
| | | $ | $ | $ | $ | $ | $ |
| | | | | | | | |

3—14446

a 2.

Computation Moved

Form 1040
U. S. Internal Revenue
(Auditor's Stamp)

APR 25 1928

# INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
OR INCOMES, REGARDLESS OF AMOUNT, FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

## For Calendar Year 1927

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1928

Do Not Write in These Spaces

File Code 32-1

Serial Number 300423

(Cashier's Stamp)

PRINT NAME AND ADDRESS PLAINLY BELOW)

MRS. C. W. BACON
(Name)

(Street and number, or rural route)

ABILENE, TEXAS
(Post office) (County) (State)

Occupation, Profession, or Business

Cash Check M. O. Cert. of Int. 07
First Payment 84

$
Carded

As

1. Are you a citizen or resident of the United States? YES
2. If you filed a return for 1926, to what Collector's office was it sent? DALLAS
3. Is this a joint return of husband and wife? NO - COMMUNITY
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent MR. C.W.BACON, SAME ADDRESS
5. Were you married and living with husband or wife on the last day of your taxable year? YES
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? NONE

## INCOME

| Item and Instruction No. | | Amount received | Expenses paid (Explain in Schedule F) | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1 | Salaries, Wages, Commissions, etc. (State name and address of person from whom received) | | | | | | | | |
| | Bacon Securities Co., Abilene, Texas | $ | $ | $ | 3 | 600 | 00 | | |
| | Directors Fees | | | | | 120 | 00 | | |
| 2 | Income from Business or Profession. (From Schedule A) | | | | | | | | |
| 3 | Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source) | | | | 9 | 301 | 77 | | |
| | (a) Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source | | | | | | | | |
| 4 | Income from Partnerships. (State name and address) | | | | | | | | |
| | (a) Income from Fiduciaries. (State name and address) | | | | | | | | |
| 5 | Rents and Royalties. (From Schedule B) | | | | 5 | 312 | 18 | | |
| 6 | Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C) | | | | | | | | |
| 7 | Dividends on Stock of Domestic Corporations | | | | 29 | 798 | 40 | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 5. Rents and Royalties. (From Schedule B) | | | 5 | 312 | 16 | | | |
| 6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C) | | | | | | | | |
| 7. Dividends on Stock of Domestic Corporations | | | 29 | 798 | 40 | | | |
| 8. Taxable Interest on Liberty Bonds, etc. (From Schedule E) | | | | | | | | |
| 9. Other Income (including dividends received on stock of foreign corporations). (State nature of income) | | | | | | | | |
| (a) Oil Royalties | | | | 78 | 50 | | | |
| (b) | | | | | | | | |
| 10. TOTAL INCOME IN ITEMS 1 TO 9 | | | | | | $ | 48 210 | 85 |
| **DEDUCTIONS** | | | | | | | | |
| 11. Interest Paid | $ | 2 | 173 | 51 | | | | |
| 12. Taxes Paid. (Explain in Schedule F) | | 1 | 459 | 82 | | | | |
| 13. [illegible] Rental Commissions Paid | | | 900 | 00 | | | | |
| 14. [illegible] Auditors for defending Income Tax Case | | | 612 | 88 | | | | |
| 15. Contributions. (Explain in Schedule F) | | | 845 | 00 | | | | |
| 16. Other Deductions Authorized by Law. (Explain in Schedule F) Depletion on Oil Royalties | | | 21 | 59 | | | | |
| 17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16 | | | | | | $ | 6 012 | 80 |
| 18. NET INCOME (Item 10 minus Item 17) Less - 1/2 reported by Husband | | | | | | $ | 42 198 / 21 099 | 05 / 02 |
| | | | | | | $ | 21,099.03 | |

## COMPUTATION OF TAX (See Instruction 21)

| | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 19. Earned Net Income (not over $20,000) | $ | 5,000 | 00 | 31. Net Income (Item 18 above) | | | $ 21,099 | 03 | 42. Normal Tax (1½% of Item 38) | $ | 60 | 00 |
| 20. Less Personal Exemption and Credit for Dependents (see Instruction 20) | | 1,750 | 00 | 32. Less Dividends (Item 7 above) | $ | 14899 20 | | | 43. Normal Tax (3% of Item 40) | | 13 | 49 |
| 21. Balance (Item 19 minus 20) | $ | 3,250 | 00 | 33. Interest on Liberty Bonds, etc. (Item 8) | | | | | 44. Normal Tax (5% of Item 41) | | | |
| 22. Amount taxable at 1½% (not over the first $4,000 of Item 21) | $ | 3,250 | 00 | 34. Personal Exemption | | 1750 00 | | | 45. Surtax on Item 18 (see Instruction 21) | | 274 | 95 |
| 23. Amount taxable at 3% (not over the second $4,000 of Item 21) | | -0- | | 35. Credit for Dependents | | | | | 46. Tax on Net Income (total of Items 42, 43, 44, and 45) | $ | 348 | 44 |
| 24. Amount taxable at 5% (balance over $8,000 of Item 21) | | | | 36. Total of Items 32, 33, 34, and 35 | | | 16,649 | 20 | 47. Less Credit of 25% of Tax on Earned Net Income (Item 30) | | 12 | 19 |
| 25. Normal Tax (1½% of Item 22) | $ | 48 | 75 | 37. Balance (Item 31 minus 36) | | | $ 4,449 | 83 | 48. Balance (Item 46 minus 47) | $ | 336 | 25 |
| 26. Normal Tax (3% of Item 23) | | | | 38. Amount taxable at 1½% (not over the first $4,000 of Item 37) | | | 4,000 | 00 | 49. Adjustment for Capital Gain or Loss (12½% of Column 9, Schedule D) | | | |
| 27. Normal Tax (5% of Item 24) | | | | 39. Balance (Item 37 minus 38) | | | $ 449 | 83 | 50. Total Tax (total of or difference between Items 48 and 49) | $ | | |
| 28. Surtax on Item 19 (see Instruction 21) | | | | 40. Amount taxable at 3% (not over the second $4,000 of Item 37) | | | 449 | 83 | 51. Less Income Tax Paid at Source | | | |
| 29. Tax on Earned Net Income (total of Items 25, 26, 27, and 28) | $ | 48 | 75 | 41. Amount taxable at 5% (balance over $8,000 of Item 37) | | | $ -0- | | 52. Income and Profits Taxes paid to a foreign country or U. S. possession | | | |
| 30. Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43, and 44) | $ | 12 | 19 | | | | | | 53. Balance of Tax (Item 50 minus Items 51 and 52) | $ | 336 | 25 |

## AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1926, and the Regulations issued under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 2nd day of March, 1928.

Mrs C. H. Bacon
(Signature of individual or agent)

NOTARIAL SEAL

A. M. Buzzard Jr. / Notary Public in and for Taylor Co
(Signature of officer administering oath) (Title)

Abilene Texas,
(Address of agent)

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

B-1

## SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 2)

1. Total receipts from business or profession (state kind of business) ..... $

**Cost of Goods Sold**

2. Labor ..... $
3. Material and supplies .....
4. Merchandise bought for sale .....
5. Other costs (itemize below or on separate sheet) .....
6. Plus inventory at beginning of year .....
7. Total (Lines 2 to 6, inclusive) ..... $
8. Less inventory at end of year .....
9. Net Cost of Goods Sold (Line 7 minus Line 8) ..... $

Note.—Do not deduct here or elsewhere compensation for your services

**Other Business Deductions**

10. Salaries, exclusive of "Labor," reported on Line 2, and exclusive of compensation for your services ..... $
11. Interest on business indebtedness to others .....
12. Taxes on business and business property .....
13. Losses by fire, storm, etc. (explain in table provided therefor at foot of page) .....
14. Bad debts arising from sales or services .....
15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page) .....
16. Rent, repairs, and other expenses (itemized below or on separate sheet) .....
17. Total (Lines 10 to 16, inclusive) ..... $
18. Total Deductions (Line 9 plus Line 17) ..... $
19. Net Profit (Line 1 minus Line 18) (Enter as Item 2) ..... $

Explanation of deductions claimed on Lines 5 and 16 .....

## SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

| 1. Kind of Property | 2. Amount Received | 3. Cost | 4. Value as of March 1, 1913 | 5. Depreciation (Explain in table at foot of page) | 6. Repairs | 7. Other Expenses (Itemize below) | 8. Net Profit (Enter as Item 5) |
|---|---|---|---|---|---|---|---|
| Abilene Candy Co. Bldg. | $ 3,600 00 | $ 19,000 00 | $ -0- | $ 760 00 | $ | $ 193 50 | $ 2,646 50 |
| Bldg. on Lot 7 & 8, Pine St. | 1,968 75 | 7,500 00 | -0- | 215 00 | | 215 25 | 1,538 50 |
| Morse Bldg. | 2,087 50 | 20,000 00 | -0- | 600 00 | | 360 32 | 1,127 18 |
| | $ 7,656 25 | | | $ 1,575 00 | | $ 769 07 | $ 5,312 18 |

Explanation of deductions claimed in Column 7 .....

## SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

| 1. Kind of Property | 2. Date Acquired | 3. Amount Received | 4. Depreciation Allowable Since Acquisition | 5. Cost | 6. Value as of March 1, 1913 | 7. Subsequent Improvements | 8. Net Profit (Enter as Item 6) |
|---|---|---|---|---|---|---|---|
| | | $ | $ | $ | $ | $ | $ |
| | | | | | | | |
| | | | | | | | |

State how property was acquired .....

## SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

| 1. Kind of Property | 2. Date Acquired | 3. Date Sold | 4. Amount Received | 5. Depreciation Allowable Since Acquisition | 6. Cost | 7. Value as of March 1, 1913 | 8. Subsequent Improvements, and Capital Deductions | 9. Net Gain or Loss (Enter 12½% as Item 49) |
|---|---|---|---|---|---|---|---|---|
| | Mo. Day Year | Mo. Day Year | $ | $ | $ | $ | $ | $ |
| | | | | | | | | |
| | | | | | | | | |

State now property was acquired

## SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

| 1. Obligations or Securities | 2. Interest Received or Accrued | 3. Amount Owned | 4. Principal Amount Exempt From Taxation | 5. Amount Owned in Excess of Exemption | 6. Interest on Amount in Excess of Exemption (Enter as Item 8) |
|---|---|---|---|---|---|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia | $ | $ | All | x x x x x x | x x x x x x |
| (b) Securities issued under Federal Farm Loan Act, or under such Act as Amended | | | All | x x x x x x | x x x x x x |
| (c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possessions of the United States | | | All | x x x x x x | x x x x x x |
| (d) Liberty 4% and 4¼% Bonds, Treasury 3⅜%, 3¾%, 4%, and 4¼% Bonds, Treasury Certificates of Indebtedness, and Treasury (War) Savings Certificates | | | $5,000 | $ | $ |
| (e) Treasury Notes | | | None | | |

## SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

**Schedule B - Item 7:**

| | | |
|---|---|---|
| Insurance | $ 463.87 | |
| Repairs | 215.25 | |
| Janitor Service | 89.95 | $ 769.07 |

**Donations:**

Boy Scouts $25.00, Salvation Army $20.00, Welfare Assn. $25.00, Orphans Home $25.00, First Christian Church $750.00

## EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. Kind of Property (If buildings, state material of which constructed) | 2. Date Acquired | 3. Age When Acquired | 4. Probable Life After Acquirement | 5. Cost (Exclusive of Land) | 6. Value as of March 1, 1913 (Exclusive of Land) | Amount of Depreciation Charged Off | |
|---|---|---|---|---|---|---|---|
| | | | | | | 7. Previous years | 8. This year |
| | | | | $ | $ | $ | $ |
| | | | | | | | |
| | | | | | | | |

## EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

| 1. Kind of Property | 2. Date Acquired | 3. Cost | 4. Value as of March 1, 1913 | 5. Subsequent Improvements | 6. Depreciation Allowable Since Acquisition | 7. Insurance and Salvage Value | 8. Deductible Loss |
|---|---|---|---|---|---|---|---|
| | | $ | $ | $ | $ | $ | $ |
| | | | | | | | |

3—14446

B-2

forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C: P-7.

Respectfully,

D. H. BLAIR,
*Commissioner.*

By (Signed) C. B. ALLEN,
*Deputy Commissioner.*

Inclosures:
Statement.
Form A.
Form 882.

47-48 Statement

IT:E:RR
RJB

In re: Mr. C. W. Bacon, Abilene, Texas

| Year | Deficiency |
|---|---|
| 1927 | $1,951.88 |

In accordance with the provisions of Treasury Decision No. 3817 (CB V-1, page 188), it is held by this office that you are subject to taxation upon the entire income received in the taxable year from community property and that the filing of a separate return by your wife for her interest in such income is not warranted under the law.

The tax liability, therefore, has been recomputed as follows:

| | | |
|---|---|---|
| Net income as reported upon the return | | $42,198.05 |
| Less: | | |
| Dividends | $29,798.40 | |
| Personal exemption | 3,500.00 | 33,298.40 |
| Balance subject to normal taxes | | $8,899.65 |
| Normal taxes: | | |
| $4,000.00 at 1½% | | $60.00 |
| 4,000.00 at 3% | | 120.00 |
| 899.65 at 8% | | 71.97 |
| | | $251.97 |
| Earned income credit: | | |
| Earned net income | | $5,000.00 |
| Less: | | |
| Personal exemption | | 3,500.00 |
| Balance | | $1,500.00 |
| Normal tax at 1½% | | $22.50 |
| Credit or 25% | | $5.63 |
| 49-50 Tax liability: | | |
| Surtax on $42,198.05 | | $2,041.79 |
| Normal taxes | | 251.97 |
| Total | | $2,293.76 |

| | |
|---|---|
| Less: | |
| Earned income credit | $5.63 |
| Tax liability | $2,288.13 |
| Tax liability reported on return | 336.25 |
| Deficiency | 1,951.88 |

57 In United States District Court

*Final judgment*

Filed June 28, 1928

This day, this cause coming on to be heard, came both parties, plaintiff and defendant, by their respective attorneys, and announced ready for trial, and a jury being expressly waived and all matters at issue, of fact as well as of law, being to the court submitted, the court, having heard the pleadings, the evidence, and the argument of counsel, is of the opinion that the law is for the plaintiff.

It is accordingly considered, adjudged, and decreed that plaintiff, C. W. Bacon, do recover of and from George C. Hopk'ns who is collector of internal revenue of the United States in and for the collection district known as the second district of Texas, the sum of one thousand nine hundred seventy-five dollars fifty-seven cents ($1,975.57) with interest thereon from this date at the rate of six per cent (6%) per annum, together with all costs of this suit.

It is further considered, adjudged, and decreed by the court that the taxes and interest sued for in this proceeding were paid by plaintiff, C. W. Bacon, to defendant, George C. Hopkins, in defendant's official capacity, as aforesaid; that the action of defendant in demanding and collecting such taxes and interest was in accordance with the instructions of his superior officers, duly appointed, qualified, and acting; that there was probable cause for his action in demand-
58 ing and collecting such taxes; and that he is entitled to a certificate herein of probable cause, which hereby is given him.

It is further considered, adjudged, and decreed that the officers of the court do have of, and recover from, the parties hereto, respectively, the costs by each of such parties respectively incurred.

It is further considered, adjudged, and decreed that all process necessary and appropriate for the enforcement of this judgment issue.

To which judgement the defendant in open court excepted, and upon his application the court allowed and defendant is hereby granted sixty days after adjournment of the present Dallas term of court within which to settle and file bill of exceptions and do all other things and procure proper orders for completion of the record for effective appeal from this judgment.

WM. H. ATWELL,
*United States District Judge.*

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 843—Jan., 1923
Comptroller General U. S.
January 18, 1922

**CLAIM FOR**

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☐ REFUND OF TAXES ILLEGALLY COLLECTED
- ☒ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

**IMPORTANT**
*File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.*

| COLLECTOR'S NOTATION |
|---|
| *District* |
| *Account number* |
| *Date received* |
| Stamp here |
| *Collector of Internal Revenue* |

State of TEXAS } ss:
County of TAYLOR }

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
Stamp here

TYPE OR PRINT

C. H. Bacon
(Name of taxpayer or purchaser of stamps.)

Abilene, Texas
(Residence—give street and number as well as city or town and State.)

Abilene, Texas
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

| PERIOD | YEAR |
|---|---|
| From: 1-1 | 19 27 |
| To: 12-31 | 19 27 |

1. Business in which engaged Corporate executive - Managing investments
2. Character of assessment or tax Income Tax
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $2,311.82
4. Reduction of Tax Liability requested (Income and Profits Tax) $1,975.57
5. Amount to be abated $ None
6. Amount to be refunded (or such greater amount as is legally refundable) $1,975.57
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) June 6, 1928

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed Dallas, Texas
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked; period from to $

Deponent verily believes that this application should be allowed for the following reasons:

In May, 1928, the Commissioner of Internal Revenue assessed against plaintiff additional income tax and interest for the year 1927 in the sum of $1975.57, which was paid to the Collector of Internal Revenue at Dallas under protest and duress on June 6, 1928. The additional tax assessed was occasioned by the Commissioner including as the income of claimant one-half of the income received by claimant and his wife in the year 1927, which income was community property under the laws of the State of Texas, whereas the claimant and his wife had filed separate

Collector of Internal Revenue

TYPE OR PRINT

C. N. Bacon
(Name of taxpayer or purchaser of stamps.)

Abilene, Texas
(Residence—give street and number as well as city or town and State.)

Abilene, Texas
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

| PERIOD | YEAR |
|---|---|
| From: 1-1-27 | 19 27 |
| To: 12-31-27 | 19 27 |

1. Business in which engaged Corporate executive - Managing investments
2. Character of assessment or tax Income Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $2,311.82
4. Reduction of Tax Liability requested (Income and Profits Tax) $1,975.57
5. Amount to be abated $ None
6. Amount to be refunded (or such greater amount as is legally refundable) $1,975.57
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) June 6, 1928

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed Dallas, Texas
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked; period from to $

Deponent verily believes that this application should be allowed for the following reasons:

In May, 1928, the Commissioner of Internal Revenue assessed against plaintiff additional income tax and interest for the year 1927 in the sum of $1975.57, which was paid to the Collector of Internal Revenue at Dallas under protest and duress on June 6, 1928. The additional tax assessed was occasioned by the Commissioner including as the income of claimant one-half of the income received by claimant and his wife in the year 1927, which income was community property under the laws of the State of Texas, whereas the claimant and his wife had filed separate income tax returns for the year 1927 and each had reported one-half of the community income and property so received in 1927. Claimant says that the original returns so filed by him and his wife were correct and that the action of the Commissioner in making said additional

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this _____ day of _____, 19__

Signed:

_____

_____
(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

o3—11704

01

766—30. (Face p. 20.) No. 1

Schedule No. _____

## CERTIFICATES

**I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:**

| NAME OF TAXPAYER. | Character of assessment and period covered. | List. | Year. | Month. | Page. | Line. | Amount. | Date paid. | District in which paid. |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | $ | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |

_____
*Collector of Internal Revenue.*

_____
*Assessment Clerk, Commissioner's Office.*

Claim No. _____

**I certify that the records of my office show the following facts as to the purchase of stamps:**

| TO WHOM SOLD OR ISSUED. | Kind. | Number. | Denomination. | Date of sale or issue. | Amount. | If special tax stamp, state: | |
|---|---|---|---|---|---|---|---|
| | | | | | | Serial number. | Period commencing— |
| | | | | | $ | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

_____
*Collector* _____ *District* _____

Claim No. _____

Schedule Number _____ District _____

Allowed or Rejected Number _____ _____
(Nature of tax.)

Claimant _____

_____

*Collector of Internal Revenue.*

_____

*Assessment Clerk, Commissioner's Office.*

Claim No. _____ Claim No. _____

**I certify that the records of my office show the following facts as to the purchase of stamps:**

| To whom sold or issued. | Kind. | Number. | Denomination. | Date of sale or issue. | Amount. | If special tax stamp, state: | |
|---|---|---|---|---|---|---|---|
| | | | | | | Serial number. | Period commencing— |
| | | | | | $ | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

_____

*Collector* _____ *District* _____

Schedule Number _____ District _____

Allowed or Rejected Number _____ _____

(Nature of tax.)

Claimant _____

Address _____

Examined and submitted for action _____, 19____

Schedule No. _____

| Claim examined by— |
|---|
| Claim approved by— |
| *Chief of Division.* |

**COMMITTEE ON CLAIMS**

Amount claimed... $_____ _____

Amount allowed... $_____ _____

Amount rejected... $_____ _____

93—11704

GOVERNMENT PRINTING OFFICE

D2

assessment is erroneous and illegal, in that under the Revenue Act of 1926, and the Constitution of the United States, a husband residing in Texas should report only one-half of the income received by him and his wife which is community property under the laws of Texas. The construction and application of the Revenue Act of 1926 made by the Commissioner of Internal Revenue in this case violates the terms and provisions of said Act, as well as those portions of Article 1 of the Constitution requiring uniformity in taxation and the apportionment of direct taxes among the several states, and also violates the due process clause of the Fifth Amendment to the Constitution and the Sixteenth Amendment to the Constitution. Because of these facts claimant is entitled to the refunding of the sums so paid, together with interest.

D3

In United States District Court

*Motion for extension of time for appeal and order allowing same*

Filed August 10, 1928

*To the Honorable Wm. H. Atwell, Judge of said Court:*

Comes now Geo. C. Hopkins, collector of internal revenue, by his counsel, and shows to the court that decision and determination respecting appeal from the judgment of the court entered in
59 this cause June 25, 1928, has not been made and communicated by the proper officials of the Department of Justice authorized by law to make such decision, and that it is necessary the time within which to settle and file bill of exceptions and do all other things necessary or required for effective appeal by the defendant from said judgment be extended thirty days from the expiration of the sixty-day period granted for that purpose by the judgment entered herein June 25, 1928.

Wherefore defendant prays the entry of an order extending such time for such period of thirty days.

NORMAN A. DODGE,
*United States Attorney, Attorney for Defendant,*
*Geo. C. Hopkins, Collector of Internal Revenue.*

Order

Upon consideration of the foregoing motion the same is granted and the time for settling and filing bill of exceptions and doing other things for effective appeal from the judgment of this court is hereby extended thirty days from the expiration of the sixty days originally granted by the terms of the judgment of June 25, 1928.

This 6th day of August, 1928.

WM. H. ATWELL,
*United States District Judge.*

60 In United States District Court

*Petition for appeal*

Filed Sept. 21, 1928

*To the Honorable Wm. H. Atwell, District Judge:*

Geo. C. Hopkins, collector of internal revenue, defendant, feeling aggrieved by the judgment rendered against him in the above-entitled cause on the 25th day of June, 1928, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herewith, and shows the said appeal is brought up by direction of the Bureau of Internal Revenue and the Attorney General, departments respectively of the Government;

Wher'fore he prays that his appeal be allowed; that no bond, obligation, or security be required to prosecute the same; that citation be issued as provided by law, and that a transcript of the record and proceedings upon which said judgment was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Fifth Circuit under the rules of said court in such cases.

NORMAN A. DODGE,
*United States Attorney, Attorney for*
*Geo. C. Hopkins, Collector of Internal Revenue.*

61 In United States District Court

*Order allowing appeal*

Filed Sept. 21, 1928

The foregoing petition and assignments of errors accompanying the same are ordered filed, and the appeal is allowed without bond, obligation, or security, as therein prayed.

The 21st day of September, 1928.

WM. H. ATWELL,
*United States District Judge.*

In United States District Court

*Assignment of errors*

Filed Sept. 21, 1928

Comes now the defendant in the above-entitled cause and files the following assignment of errors upon which he will rely for prosecution of his appeal in said cause from the judgment rendered by the honorable District Court herein on the 25th day of June, 1928.

1

The District Court erred in rendering judgment against the defendant for the taxes sued for, because the allegations in the plaintiff's amended petition do not support the judgment, in that the income shown thereby to have been received which incurred the taxes in controversy is taxable to the plaintiff under the applicable revenue act of 1926.

62 2

The allegations of said petition do not support the judgment rendered because the income disclosed thereby as having been received by the plaintiff from community property under his dominion and control is taxable to the plaintiff under the said revenue act of 1926, the said judgment awarding recovery against defendant for taxes assessed to and collected from plaintiff on such income.

3

The said judgment which awards recovery of the taxes sued for is not supported by the special findings of fact filed by the court because the said findings disclose the income which incurred the taxes in controversy is community property of plaintiff and his wife under the community property system of Texas, which income is taxable to the plaintiff under the revenue act of 1926, and the said taxes were therefore legally assessed to and collected from him.

4

The said judgment is not supported by the special findings of fact because the titles to the community property therein mentioned from which $47,880.85 of the said net income was derived stood in the name of plaintiff, and the said community property and income derived therefrom were under the dominion and control of the plaintiff alone, as provided by the laws of Texas relating to such
63–64 community property, whereby the said income (in the sum total) was net income of the plaintiff within the scope and meaning of section 210 and section 211 of the revenue act of 1926, legally taxable to him, and recovery back of taxes which said judgment awards assessed and collected on the said income so derived is erroneous.

Wherefore the appellant, George C. Hopkins, collector, prays that said judgment be reversed and the said District Court be directed to enter judgment for the defendant and in accordance with law as shall be determined by the court.

NORMAN A. DODGE,
*United States Attorney, Attorney for Defendant,*
*Geo. C. Hopkins, Collector.*

[Citation in usual form showing service on Baker, Botts, Parker & Garwood et al. omitted in printing.]

65 In United States District Court

*Praecipe for transcript of record*

Filed Sept. 21, 1928

*To the United States District Clerk, Dallas, Texas:*

SIR: You will please include in the transcript of the record for the appeal in the above-entitled cause the following papers, proceedings, and documents:

1. Plaintiff's first amended original petition.
2. The answer of defendant.
3. The special findings of fact filed by the court, including the stipulation of facts adopted therein.
4. Judgment of the court.

5. Order extending time for appeal.
6. The petition for appeal and order of the court thereon.
7. Assignment of errors.
8. Citation on appeal.

NORMAN A. DODGE,
*United States Attorney, Attorney for Defendant,*
*Geo. C. Hopkins, Collector of Internal Revenue.*

It is agreed between counsel for the respective parties in the above cause that the foregoing papers, proceedings, and documents constitute a complete record on appeal in said cause.

66 This 21st day of September, 1928.

NORMAN A. DODGE,
*United States Attorney, Attorney for Defendant,*
*Geo. C. Hopkins, Collector of Internal Revenue.*
THOMPSON, KNIGHT, BAKER & HARRIS,
FULBRIGHT, CROOKER & FREEMAN,
BAKER, BOTTS, PARKER & GARWOOD,
By PALMER HUTCHESON,
*Attorneys of Record for C. W. Bacon, Appellee.*

[Clerk's certificate to foregoing transcript omitted in printing.]

67 [Minute entry of argument and submission, Dec. 4, 1929, omitted in printing.]

68 In United States Circuit Court of Appeals, Fifth Circuit

No. 5479

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, APPELLANT

VERSUS

C. W. BACON, APPELLEE

Appeal from the District Court of the United States for the Northern District of Texas

Norman A. Dodge, U. S. attorney; C. M. Charest, Gen. Counsel, Bureau of Int. Rev.; T. H. Lewis, jr. spec. atty., Bureau of Int. Rev., for appellant. Rhodes S. Baker, Harry C. Weeks, R. C. Fulbright, Palmer Hutcheson (Thompson, Knight, Baker & Harris; Weeks, Morrow, Francis & Hankerson; Fulbright, Crooker & Freeman; Baker, Botts, Parker & Garwood on the brief) for appellee. Monte M. Lemann and Chas. E. Dunbar jr., filed a brief as amici curiæ on behalf of Louisiana taxpayers.

Before WALKER, BRYAN AND FOSTER, Circuit Judges.

FOSTER, Circuit Judge:

*Opinion*

Filed Feb. 28, 1930

In this case it appears that C. W. Bacon and his wife are citizens of Texas and domiciled therein. The laws of Texas provide
69 for the matrimonial community. They made separate returns of the income of the community for the year 1927. The Commissioner of Internal Revenue held that the entire income should have been returned by the husband and determined a deficiency of $1,951.88, which was paid under protest and suit was brought to recover it back. The District Court held in favor of appellee and rendered judgment accordingly.

There is no doubt, as will appear from the well-considered opinion of the District Court, Bacon vs. Hopkins, 27 F. (2d) 140, and the authorities therein cited, that under the law of Texas the wife has a vested interest and not a mere expectancy in the community property. This is the controlling principle in determining whether the wife may file a separate return for her share of the community income. We have fully stated our views on this question in the case of Bender vs. Pfaff, F. (2d) , decided to-day, and need not repeat them in this case. No other question is presented.

Affirmed.

70 In United States Circuit Court of Appeals, Fifth Circuit

No. 5479

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE

VERSUS

C. W. BACON

*Judgment*

Feb. 28, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

71 In United States Circuit Court of Appeals

Motion for Order Staying Mandate Pending Application for Certiorari Filed March 13, 1930

[Title omitted.]

*To the said honorable court*:

Comes now Geo. C. Hopkins, collector of internal revenue, appellant in the above cause, by his counsel, and shows to the court this cause is one of several test cases arranged in the various community property States pursuant to suggestions contained in the Attorney General's opinion of July 16, 1927, and that a petition for writ of certiorari in due course is expected to be filed for review of the questions involved herein by the Supreme Court.

Appellant further shows to the court that the proceedings to accomplish such review will require a period of time greater than twenty-one days from the date of the decision of the court herein, and that a reasonable time thereafter is necessary for that purpose.

Wherefore appellant prays for an order staying issuance of mandate herein thirty days after the expiration of the twenty-one days from the date of the decision affirming the judgment of the trial court, to wit, thirty days after March 21, 1930.

(Signed) NORMAN A. DODGE,
*United States Attorney,*
*Attorney for Appellant.*

72 In United States Circuit Court of Appeals

[Title omitted.]

*Order staying mandate*

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from March 21, 1930, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from March 21, 1930, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from March 21, 1930,

unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 13th day of March, 1930.

(Signed) N. P. BRYAN,
*United States Circuit Judge.*

73 [Clerk's certificate to foregoing transcript omitted in printing.]

74 In Supreme Court of the United States

*Order allowing certiorari*

Filed May 26, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is advanced and assigned for argument on Monday, October 20th next, immediately following case No. 882, Fred O. Goodell, Collector of Internal Revenue, vs. I. B. Koch.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34,952. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 84. Geo. C. Hopkins, Collector of Internal Revenue, petitioner, vs. C. W. Bacon. Petition for writ of certiorari and exhibit thereto. Filed April 17, 1930. File No. 34,952.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. ~~934~~ 84

# In the Supreme Court of the United States

OCTOBER TERM, 1929

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

*v.*

C. W. BACON

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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107709—30

# In the Supreme Court of the United States

OCTOBER TERM, 1929

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No. ——

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, petitioner

*v.*

C. W. BACON

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Attorney General, on behalf of Geo. C. Hopkins, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 28, 1930, affirming the decision of the United States District Court for the Northern District of Texas.

**QUESTION PRESENTED**

Whether a husband domiciled in the State of Texas may properly be required to report in his separate income-tax return for 1927 the entire com-

munity income of himself and his wife; or, to state it another way, whether the wife has such an interest in the community income that she has a right to report one-half of such income in her separate return.

## STATEMENT

The respondent married in 1894 and ever since has resided with his wife in the State of Texas. (R. 13.)

During 1927 and prior thereto the wife owned separate property consisting of shares of stock of two Texas corporations and a promissory note for $500. All other property owned by them prior to and during the year 1927 was their community property, title to which was in the respondent's name. Such property consisted of real estate located in Texas, shares of stock in Texas corporations, interests in oil, gas, and other minerals in Texas lands, and promissory notes. (R. 13–14.)

During the year 1927 the respondent and his wife received income from the separate property of the wife, income from community property, and compensation for respondent's services. (R. 14–15, 21–22.)

The respondent and his wife filed separate income-tax returns for 1927, in which each reported one-half of the community income and claimed one-half of the deductions to which they were entitled with reference to community property. (R. 15, 22–23.)

Upon review and audit of these returns the Commissioner of Internal Revenue determined that the entire income should have been reported by the respondent, that all the deductions should have been taken by him, and that his tax should be computed upon this basis and assessed against and paid by him. Accordingly, an additional assessment of $1,951.88 was duly made against the respondent and was paid by him to the petitioner as Collector of Internal Revenue for the Second District of Texas, together with $23.69 interest, making a total payment of $1,975.57, for the recovery of which this suit is brought. (R. 15–16.)

The District Court entered judgment for the respondent. (R. 57–58.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the lower court. (R. 68.)

## STATUTES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides, in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall

be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)

SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)

SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the

tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

The applicable provisions of the Texas Constitution and Statutes will not be quoted. The principal provisions, however, are to be found in Articles 4613–4627, Vol. I, Revised Civil Statutes of Texas, 1925.

## SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Texas the husband has such control over the community income that he should properly be required to report all of such income in his Federal income-tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

**REASONS FOR GRANTING THE WRIT**

This is a test case upon the decision of which the taxability of income derived from community property defined and held under the laws of Texas will depend.

*Burns Poe, Collector of Internal Revenue for the District of Washington,* v. *H. G. Seaborn* (No. 492 on the Docket of this Court for the present Term), a case brought here on certificate from the Circuit Court of Appeals for the Ninth Circuit, concerns the taxability of income derived from community property in the State of Washington. In *Jacob O. Bender, Collector of Internal Revenue, Petitioner,* v. *William Pfaff* a petition is filed coincidentally herewith for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court determining that the husband may not be required to pay an income tax upon more than half the entire net income derived from community property in Louisiana. The instant case presents similar questions with reference to taxation of income derived from community property in Texas. In all three of these cases the taxes in dispute were assessed in accordance with *35 Ops. Atty. Gen. 265,* and they are all test cases brought to determine

the applicability to the taxation of income from community property in Washington, Louisiana, and Texas of the principles established in *United States* v. *Robbins,* 269 U. S. 315, which dealt with the taxability of income derived from community property in California. While there are certain differences in the laws of these States which may be deemed to affect the husband's power of disposition and control over community property and income, the differences are not thought sufficient to warrant a conclusion different from that reached by this Court in the *Robbins case.*

Either the *Robbins case* is controlling, and the judgment below is erroneous, or the method of taxing income derived from community property defined and held under the laws of Texas is a question which has not been determined by this Court. Because of the importance of this question as affecting the revenue to be derived from taxation upon the income of all such property in the State of Texas, it is thought that the writ should issue, to the end that there may be an authoritative decision of this Court upon the questions involved.

Wherefore it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
*Solicitor General.*

APRIL, 1930.

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No. 84

# In the Supreme Court of the United States

OCTOBER TERM, 1930

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

*v.*

C. W. BACON

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 84

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, petitioner

*v.*

C. W. BACON

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The United States District Court for the Northern District of Texas rendered no opinion. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 25) is reported in 38 F. (2d) 651.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1930. (R. 25.) Petition for certiorari was filed April 17, 1930. Certiorari was granted May 26, 1930. (R. 27.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

Whether the entire community income of a husband and wife domiciled in the State of Texas for the year 1927 is taxable as the income of the husband; or to state it another way, whether the wife has such an interest in the community income that she has the right to report one-half of such income in her separate return.

## STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra*, pp. 40–57.

## STATEMENT

The respondent was married in Texas in 1894 and since then he and his wife have resided together in that State. (R. 7, 10.)

During 1927 and prior thereto the respondent's wife owned and had possession of certain separate property, the record title to which stood in her name; namely, 18 shares of the capital stock of the H. O. Wooten Grocery Company, a Texas corporation; 6 shares of the capital stock of the Abilene Building & Loan Association, a Texas corporation, and a promissory note bearing 8% interest. (R. 8.) The stock of the two corporations was given to her by her husband from community property and the promissory note represents a loan made by her out

of money given to her by her husband out of community funds prior to 1927. (R. 11.)

All other property owned by the respondent and/or his wife during the year 1927 was their community property under the laws of Texas, the record titles to which were in the respondent's name. The community property in question consisted of real estate located in Texas, shares of stock in Texas corporations, and of interest in oil, gas, and other minerals in and under lands situated in Texas and money loaned at interest evidenced by promissory notes. (R. 8, 11.)

The gross income of the respondent and his wife for the year 1927 was as follows (R. 8, 11, 12):

| | |
|---|---|
| Interest from loan of community funds | $9,261.77 |
| Interest from loan of wife's separate funds | 40.00 |
| Dividends from shares of stock representing community property | 29,508.40 |
| Dividends from shares of stock representing wife's separate property | 290.00 |
| Rents from leasing community real estate | 5,312.18 |
| Royalties (community property) | 78.50 |
| Salary of respondent | 3,600.00 |
| Director's fees of respondent | 120.00 |
| Total | 48,210.85 |

Allowable deductions for the year totaled $6,012.80, leaving a net income subject to tax of $42,198.05. (R. 8.)

The respondent and his wife filed separate income-tax returns for 1927 in which they reported the above-mentioned income and deductions, each reporting one-half of the net income or $21,099.02, and each claiming one-half of the personal exemption. Each return showed a tax liability of $336.25. (R. 8.)

Upon review and audit of these returns the Commissioner of Internal Revenue determined that the entire income should have been reported by the respondent, that all the deductions should have been taken by him, and that his tax should be computed accordingly. Thereafter, an additional assessment of $1,951.88 was duly made against the respondent and was paid by him under protest to the petitioner as Collector of Internal Revenue for the Second District of Texas, together with $23.69 interest, making a total payment of $1,975.57, for the recovery of which this suit is brought. (R. 9, 6.)

The District Court entered judgment for the respondent. (R. 20.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the lower court. (R. 25.)

This court granted certiorari on May 26, 1930. (R. 27.)

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Texas the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

## SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

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[1] The following material to stars on p. 6 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

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Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 40, construed as similar provisions were construed in the ***Robbins case,*** do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

* * * * * [2]

The question, therefore, is not whether the husband or wife has a "vested" or "expectant" or "legal" or "equitable" title to the community property under the laws of Texas, but what substantial rights of dominion and enjoyment he or she may exercise. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to

[2] See footnote 1, p. 5.

her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income and are nevertheless not taxed upon it. The Act should be construed and applied, if possible, so as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

During the existence of the community the Texas husband alone has unrestricted power to make contracts and bring suits relating to community property and to sell, mortgage, or otherwise dispose of it, except that he may not give it away with the deliberate intention of defrauding his wife. An exception which existed at one time as to his control of his wife's earnings and income from her separate estate was not in effect in 1927. The community property is made liable for all debts incurred by the husband and all judgments secured against him of whatever nature and he and his separate property are liable for the payment of all community debts.

On the other hand, the wife can not make any contract which will bind the community property, other than her personal earnings and the income, rents, and revenues of her separate estate. The only exception is that she may contract for necessaries for herself and her children and create a valid community debt. She also has no power to sue and collect a community claim.

Only where she is abandoned by her husband or he becomes insane does she acquire the right to control and enjoy the community property and income. She can not petition for a division of community property without applying for a divorce, and the court in awarding her a divorce and dividing the community property may or may not give her one-half.

Clearly, there is no material difference between the respective rights of husband and wife in California and in Texas and as they existed in California at the time the *Robbins case* arose, and the husband, having all of the present rights of control and enjoyment, should be taxed upon the entire community income.

## ARGUMENT

## I

### Preliminary Statement [3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298, 435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire

[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico, and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the com-

[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 41. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

mencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

## II

### Where the Husband Has Control Over and the Right to Enjoy the Entire Community Income He Is Required to Include It in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words. There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where the definitions of property rights and titles vary with the local laws. The view originally held in the Treasury Department and in the Department of Justice (T. D. 3071, *supra;* T. D. 3138, *supra;* 32 Op. Atty. Gen. 298, 435, *supra*) that the wife has an interest in income from community prop-

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

erty equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income *"of every individual."* (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the statute involved in the *Robbins case, supra,* and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 40.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax

thereon. The tax is imposed upon the income of individuals, and the application of this language to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, Sections 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and*

> *further considerations lead to the conclusion that it was intended to tax him for the whole.* For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, Sec. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. Sec. 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers,* 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title,

> whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271, *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate, it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 40, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case,* do not require the taxation of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a

principle which is recognized in various provisions of the Revenue Acts. The *Corliss case,* as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is distributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case.* Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition of the fund; that he might spend it substantially

as he chose, and that if he wasted it in debauchery, the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights and powers of individual taxpayers in controlling and disposing of income received. "The power of

taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Texas, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated. The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 245 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309. The test that he who has the power of disposition should bear the burden of the tax finds support in the general language of the statute and so to construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins,* 269 U. S.

315; *Corliss* v. *Bowers,* 281 U. S. 376; *Tyler* v. *United States,* 281 U. S. 497; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Texas and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

## III

### Under the Laws and Judicial Decisions of the State of Texas the Husband's Interest in the Community Income During Coverture Is Such That He Should Properly Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such That She Should Be Permitted to Report One-Half of the Community Income in Her Return [6]

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights, of the husband and wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal

[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

even with his own property universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her support after his death. Thus a limited right in the wife to bind the community by contracts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 573, and cases cited. Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 4385. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This gives the wife no greater right (except as to the amount) than she has in Oklahoma, where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224

of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate, and even those States protect the wife's interest in the homestead. In practically all States provisions which give to the wife the assurance of receiving a certain proportion of the husband's real estate upon his death are accompanied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss*

*case,* to "actual command" of the income taxed, so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an ex-

press provision of the early Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy, and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du Palais Repertoire, verbo, communaute', 739, 741, *et seq.*)

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Texas which disclose the rights of the

spouses to control and enjoy community property and its income.

* * * * * [7]

At the outset it is important to note that the definition of the term "community property" in Article 4619 of the Revised Civil Statutes, as amended, *infra,* is exceedingly broad and that the Texas courts have construed the term as embracing very nearly all income which the spouses receive either from their separate property or from community property and their personal labor. *Braden* v. *Gose,* 57 Texas 37; *Claflin & Co.* v. *Pfeiffer,* 76 Texas 469; *Dixon* v. *Sanderson,* 72 Texas 359; *Arnold* v. *Leonard,* 114 Texas 535.

In 1917 the State legislature attempted to make the rents and revenues from the wife's separate lands her separate property and the rents and revenues of the husband's separate lands his separate property. Act of April 4, 1917, Laws of Texas, 1917, Reg. Sess., c. 194, p. 436. The Supreme Court of the State, however, in *Arnold* v. *Leonard, supra,* subsequently held that this Act and the Act of March, 1921, Gen. Laws of Texas, 37th Leg., c. 130, p. 251, containing similar provisions were unconstitutional in so far as they increased the wife's separate property over that allowed to her in Article XVI, Section 15, of the Constitution (*infra,* p. 42), which limited her separate estate to property "owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent."

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[7] See footnote 6, p. 18.

For the same reason, the provision now contained in Article 4615 of the Revised Statutes, making compensation for personal injuries to the wife her separate property, has also been held to be unconstitutional. *Northern Texas Traction Co.* v. *Hill,* 297 S. W. 778;[8] *Teague* v. *Fairchild,* 15 S. W. (2d) 585.

By virtue of Article 4619 of the Revised Civil Statutes, as amended, *infra,* there is in Texas, as in other community property States, a presumption that all property of the spouses constitutes community property. The presumption is rigorously applied in Texas. *Cooke* v. *Bremond,* 27 Texas, 457; *Oppenheimer* v. *Robinson,* 87 Texas, 174.

Not only is it true that all income from the separate property of the wife as well as from community property, excepting capital gains resulting from accretions in the value of her separate property, is part of the community (*Arnold* v. *Leonard, supra*), but it also appears that the spouses have no power by agreement to change its character in advance of its receipt. *Kellett* v. *Trice,* 95 Texas, 160; *McDonald* v. *Stevenson,* 245 S. W. 777. Granting that the husband may give the wife his interest in community property so long as the gift does not in-

[8] The citations to Texas cases in this brief are to the official reports whenever possible. But many cases decided by the Texas Court of Civil Appeals and by the Texas Commission of Appeals are not officially reported, and in such instances reference is made to the Southwestern Reporter.

terfere with the rights of creditors (*Cauble* v. *Beaver-Electra Ref. Co.,* 115 Texas, 1), yet, under the decision in the *Leonard case, supra,* the income from the gift would nevertheless be community property. The husband and wife have no power to change the character of this income prior to its receipt. *Cox* v. *Miller,* 54 Texas, 16; *Green* v. *Ferguson,* 62 Texas, 525; *Martin* v. *Martin,* 17 S. W. (2d) 789; *Brokaw* v. *Collett,* 1 S. W. (2d) 1090. The latter case was decided by the Commission of Appeals and its judgment affirmed by the Supreme Court.

The Texas courts have not adopted the theory that the community is a legal entity. Analogies are drawn in some of the opinions to partnership and trust cases and principles applicable in such cases have been applied to the community. *Simpson* v. *Brotherton,* 62 Texas, 170; *Moody* v. *Smoot,* 78 Texas, 119; *Briggs* v. *McBride,* 190 S. W. 1123; *Stramler* v. *Coe,* 15 Texas, 211; *Burnham* v. *Hardy Oil Co.,* 108 Texas, 555; 35 Harvard Law Review, 62–63; *Patty* v. *Middleton,* 82 Texas, 586. It must also be admitted that the Texas courts generally recognize that the wife has a "present" or "vested" interest of some kind in the community property. *Edwards* v. *Brown,* 68 Texas, 329; *Arnold* v. *Leonard, supra; Patty* v. *Middleton, supra; Burnham* v. *Hardy Oil Co., supra.* But all such analogies and characterizations break down under comparison of rights and obligations established in statutes and decisions of controlling force. As we

have argued, such theories are not material to the decision which must turn upon actual rights of dominion and control and not upon the names which may have been given to the ganglia of rights and interests involved.

(A)

DURING THE EXISTENCE OF THE COMMUNITY, AND SO LONG AS THE HUSBAND DOES NOT ABANDON HIS WIFE, HE ALONE HAS UNRESTRICTED POWER TO MAKE CONTRACTS AND BRING SUITS RELATING TO COMMUNITY PROPERTY AND TO SELL, MORTGAGE, OR OTHERWISE DISPOSE OF IT, EXCEPT THAT HE MAY NOT GIVE IT AWAY WITH THE DELIBERATE INTENTION OF DEFRAUDING HIS WIFE

Article 4619, Revised Civil Statutes, as amended, *infra.*

*Stramler* v. *Coe,* 15 Texas, 211.
*Moody* v. *Smoot,* 78 Texas, 119.
*Coss* v. *Coss,* 207 S. W. 127.
*Bell* v. *Crabb,* 244 S. W. 371.
*Jordan* v. *Moore,* 65 Texas, 363.
*Rowlett* v. *Mitchell,* 52 Tex. Civ. App. 589.
*Briggs* v. *McBride,* 190 S. W. 1123.
*Wiener* v. *Zweib,* 105 Texas, 262.
*First Nat. Bank* v. *Davis,* 5 S. W. (2d) 753.
*Dallas Plumbing Co.* v. *Harrington,* 275 S. W. 190.

Article 4619 of the Revised Civil Statutes, *infra,* provides that during the existence of the community the husband alone shall have the right to dispose of community property. Article 4614, *infra,* provides that the wife shall have "the sole manage-

ment, control, and disposition" of her "separate property." This section also defines her separate estate as including rents, revenues, interest, and dividends derived therefrom. In *Arnold* v. *Leonard, supra,* the Supreme Court of Texas held that the Legislature was without power to include these items in the separate property of the wife. It follows from Article 4619, which gives the husband exclusive power of disposition over all community property, and Article 4614, which confines the wife's control and management to her separate estate, that the rents, revenues, interest, and dividends derived from the wife's separate estate are within his exclusive control.

This was not the rule prior to the enactment of the Revised Civil Statutes. *Arnold* v. *Leonard,* supra; *Gohlman, Lester & Co.* v. *Whittall,* 114 Tex. 548; *Cauble* v. *Beaver-Electra Ref. Co.,* 115 Tex. 1. See Act of March 21, 1913, Laws of Texas, 1913, Reg. Sess. c. 32, p. 61; Act of April 4, 1917, Laws of Texas, 1917, Reg. Sess. c. 194, p. 436. The Act of 1913 gave the wife the control, management, and disposition of her personal earnings, rents from her real estate, interest on her bonds and notes, and dividends on her stocks. The Act of 1917 attempted to add these items, excepting her personal earnings, to her separate estate. But the Revised Civil Statutes of 1925 omit the provision of the Act of 1913 giving the wife the control, management, and disposition of her earnings, rents, interest, and dividends. In *Arnold* v. *Leonard, supra,*

the Act of 1917 was held unconstitutional in attempting to include these items, except personal earnings, in the separate estate of the wife. Thus the wife is left with the control of her separate property only as provided in Art. 4614, Rev. Civ. St. 1925, *infra,* p. 49. In this connection it should be noted that the Revised Civil Statutes of 1925 are more than a mere compilation of existing laws, and unless their provisions are ambigious there is no propriety in looking to the prior laws in their interpretation. *American Indemnity Co.* v. *Austin,* 112 Tex. 239; *City of Lubbock* v. *The Magnolia Petroleum Co.,* 6 S. W. (2d) 80. See also *Hamilton* v. *Rathbone,* 175 U. S. 414; *United States* v. *Bowen,* 100 U. S. 508; *Reese* v. *Cobb,* 105 Texas 399.

We maintain, therefore, that during 1927 the husband alone had the right "to dispose" of all of the community income and property.

In interpreting the statutes the Texas courts have not sought to hamper the husband's powers in any way so long as he does not deliberately defraud his wife. In *Moody* v. *Smoot,* 78 Texas 119, *supra,* with regard to the husband's control of community property the Supreme Court of Texas said (p. 123):

> Barring any disposition made with intent to defraud her, he may sell, barter, or give it away.

To the same effect is the very recent case of *Shaw* v. *Shaw,* 28 S. W. (2d) 173.

No distinction is made between the husband's right to dispose of community personalty and

community real estate. It is not essential that the wife join in the deed conveying community real estate. *Bell* v. *Crabb, supra,* decided by the Commission of Appeals, the judgment later being entered as the judgment of the Supreme Court of Texas. The husband may also mortgage the community personal property or real estate without his wife's consent. *Sutton* v. *Lovan,* 279 S. W. 295; *Wiener* v. *Zweib, supra; First National Bank* v. *Davis, supra; Brunson* v. *Donald,* 3 S. W. (2d) 596.

The only limitation is as to the homestead. Under Article 4618 of the Revised Civil Statutes, *infra,* it is provided that the homestead, whether it represents community or the separate property of one of the spouses, shall not be disposed of except by the joint conveyance of husband and wife. See also *Flynn* v. *J. M. Radford Grocery Co.,* 174 S. W. 902.

The rule that the husband can not deliberately defraud his wife by gifts of the community property is one that has not been applied except under extraordinary circumstances. Under normal circumstances he may freely dispose of community property by gift and the question as to whether the disposition will benefit the wife or the community is not given consideration. *Rowlett* v. *Mitchell,* 52 Tex. Cir. App. 589, *supra; Coss* v. *Coss, supra; Martin* v. *McAllister,* 94 Texas 567.

In the *Coss case* the husband had abandoned his wife and was ruthlessly depriving her of her means of support by giving away his property to his mistress. Under such circumstances the court held that the wife was entitled to protection. Similarly, in *Krenz* v. *Strohmeir,* 177 S. W. 178, writ of error refused, 188 S. W. xvi, the court held that where a husband with intent to defraud his wife placed property bought with community funds in the name of his son, no consideration passing from the son, the son acquired legal title, but the deeds were ineffective to deprive the wife of her equitable estate.

On the other hand, in *Rowlett* v. *Mitchell, supra,* it was held that where a husband of limited means had continued to pay premiums on a life-insurance policy, taken out before his marriage for the benefit of his children by a former wife, the wife could not follow and recover funds of the community disposed of for such purposes.

The right of disposition carries with it the right to enter into any kind of contract relating to community property without consulting the wife. The husband is the "manager" with all the powers that the term implies. *Wright* v. *Hays,* 10 Texas 130; *Moody* v. *Smoot,* 78 Texas 119, *supra; Dallas Plumbing Co.* v. *Harrington,* 275 S. W. 190, *supra; Arnold* v. *Leonard,* 114 Texas 535, *supra.* He alone can sue and collect community claims. *Jordan* v. *Moore,* 65 Texas 363, *supra.*

(B)

DURING THE EXISTENCE OF THE COMMUNITY THE COMMUNITY PROPERTY IS MADE LIABLE FOR THE PAYMENT OF ALL DEBTS INCURRED BY THE HUSBAND AND ALL JUDGMENTS SECURED AGAINST HIM OF WHATEVER NATURE, AND HE AND HIS SEPARATE PROPERTY ARE LIABLE FOR THE PAYMENT OF ALL COMMUNITY DEBTS

Articles 4616, 4620, 4621, 4623, 4634, Revised Civil Statutes, *infra.*

*Ochoa* v. *Edwards,* 189 S. W. 1022, writ of error refused, 190 S. W. xv.

*Braden* v. *Gose,* 57 Texas 37.

*Seabrook* v. *First Nat. Bank,* 171 S. W. 247.

Article 4620 of the Revised Civil Statutes, *infra,* provides that the community property of husband and wife shall be liable for their debts contracted during marriage except in such cases as are specially excepted by law. In so far as the husband is concerned, the only exception to his ability to incur debts which will bind the community is that he may not incur any such debts after a suit for divorce is brought. Article 4634, Revised Civil Statutes, *infra.*

Article 4616, *infra,* however, provides that the wife's personal earnings and the rents, revenues, and interest from the wife's separate property shall not be subject to any debts or torts of the husband.

The net result is that so long as the husband and wife are living together the community property (other than that mentioned in the preceding para-

graph) is liable for all of the debts incurred by the husband irrespective of the purpose for which they were incurred. In other words, the debts of the husband are community debts. *Ochoa* v. *Edwards, supra.* With the same exceptions, a judgment against him will bind the community estate. *Jordan* v. *Moore, supra,* 65 Texas 363.

(C)

DURING THE EXISTENCE OF THE COMMUNITY THE WIFE CANNOT MAKE ANY CONTRACTS, EXCEPT FOR NECESSARIES, WHICH WILL BIND THE COMMUNITY PROPERTY OTHER THAN HER PERSONAL EARNINGS AND THE INCOME, RENTS, AND REVENUES FROM HER SEPARATE PROPERTY, NOR CAN SHE SUE AND COLLECT ANY COMMUNITY CLAIM EXCEPT IN CASES WHERE SHE IS ABANDONED BY HER HUSBAND OR HE BECOMES INSANE

Articles 4619, 4621, 4623, Revised Civil Statutes, *infra.*

*Fullerton* v. *Doyle,* 18 Texas 3.

*Wright* v. *Hays,* 10 Texas 130.

*Zimpelman* v. *Robb,* 53 Texas 274.

*Hamlett* v. *Coates,* 182 S. W. 1144, writ of error refused, 190 S. W. xv.

*Davis* v. *Davis,* 186 S.W. 775.

Article 4621 of the Revised Civil Statutes, *infra,* specifically provides that the community property shall not be liable "for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children." Article 4623, *infra,* provides that neither the separate property of the husband nor the community property other than her personal earnings and the income, rents,

and revenues from her separate property shall be subject to the payment of the wife's debts except those contracted for necessaries furnished her or her children.

The wife's power to bind the community for the purchase of necessaries is undoubtedly founded on the husband's obligation to support his wife and is not inherent in the community property system. The term "necessaries" is limited to living expenses. For example, in *Winkie* v. *Conatser,* 171 S. W. 1017, writ of error refused, 179 S. W. xvi, it was held that a debt due from the wife for a commission on the exchange of her separate property is not a necessary expense within the meaning of the provision.[9]

In the case of *Crim* v. *Austin,* 6 S. W. (2d) 348, the Commission of Appeals decided that the provision exempting the community property from liability for the wife's debts did not relate to the wife's torts and that the community property was subject to the payment of damages for torts committed by the wife. The judgment of the Commission of Appeals was affirmed by the Supreme Court. But her

[9] There is no discussion in this brief as to the powers which a wife acquires by being given the right under Article 4626, *infra*, to be declared a *feme sole* for mercantile and trading purposes, as the record does not show that the petitioner's wife had been declared a *feme sole* under this provision. Moreover, it principally affects her rights as to her separate property. For a comprehensive analysis of the wife's power to contract generally, see *Red River Nat. Bank* v. *Ferguson*, 109 Texas 287.

separate property must be first exhausted. *Zeliff* v. *Jennings,* 61 Texas 458.

The wife is not a necessary party in any action to recover on a community claim. *Dallas Ry. & Terminal Co.* v. *Sutherland,* 27 S. W. (2d) 830. Nor can she be sued without her husband being joined. *Taylor* v. *Hustead & Tucker,* 257 S. W. 232.

When the wife is abandoned by the husband, Article 4619 of the Revised Civil Statutes, *infra,* enables her under certain conditions to file a petition to secure to herself the complete control, management, and disposition of community property. While the benefit of this provision is limited to cases where the wife does not know her husband's whereabouts, it has nevertheless been recognized independently of this provision that a woman abandoned by her husband may sell community property to support herself and her family. *Zimpelman* v. *Robb,* 53 Texas, 274, *supra.* Under such circumstances she may also sue to recover community property. *Hamlett* v. *Coates, supra; Davis* v. *Davis, supra.* Nor have the courts been disposed to question the propriety of her acts so long as no actual fraud against the husband is committed. *Zimpelman* v. *Robb, supra.*

The rule as to the wife's power to bind the community property is the same in cases where the husband becomes insane. *Forbes* v. *Moore,* 32 Texas, 195.

(D)

THE WIFE CAN NOT PETITION FOR A DIVISION OF COMMUNITY PROPERTY BETWEEN HERSELF AND HER HUSBAND WITHOUT APPLYING FOR A DIVORCE, AND IF SHE APPLIES FOR A DIVORCE SHE HAS NO ASSURANCE THAT SHE WILL BE AWARDED ONE-HALF OF THE COMMUNITY PROPERTY

Articles 4634, 4635, and 4638, Revised Civil Statutes, *infra.*

*Hedtke* v. *Hedtke,* 112 Texas, 404.

*Strickland* v. *Strickland,* 276 S. W. 795.

*Moor* v. *Moor,* 24 Texas Civ. App. 150, writ of error refused, 58 S. W. xv.

*Gonzales* v. *Gonzales,* 117 Texas, 183.

*Martin* v. *Martin,* 17 S. W. (2d) 789.

It is well settled that the Texas wife can not compel her husband to give a certain portion of the community income or property to her by means of a suit for partition or a suit for maintenance. *Gonzales* v. *Gonzales, supra; Martin* v. *Martin, supra; Borton* v. *Borton,* 190 S. W. 192, writ of error refused, 196 S. W. xiv; *Irwin* v. *Irwin,* 110 S. W. 1011. His liability for her support exists independently of the existence of community property. *Hedtke* v. *Hedtke, supra; Magee* v. *White,* 23 Texas, 180.

It is only in connection with proceedings for a divorce that a division of the community property may be secured or that she may secure protection from her husband's expenditures of community funds. Article 4635 of the Revised Civil Statutes,

*infra,* enables her by injunction to restrain him from spending any community funds during the pendency of the action. Article 4638, *infra,* provides that the court granting the divorce shall make a division of their estate "in such a way as the court shall deem just and right" but directs further that nothing therein shall be construed as compelling either party to divest himself or herself of the title to real estate.

If there is no decree of partition at the time of divorce the husband and wife thereafter hold the community property as tenants in common. *Southwestern Mfg. Co.* v. *Swan,* 43 S. W. 813; *Jones* v. *Frazier,* 201 S. W. 445.

In the event that the court does enter a decree partitioning the community property, the statute clearly authorizes the court to depart from an exactly even division and the courts have so held. *Moor* v. *Moor, supra; Hedtke* v. *Hedtke, supra.* In the latter case the court said (p. 406):

> While the court, in ordering the divorce, should not be unmindful of the benefits which the spouse not at fault would have derived from a continuance of the marriage, through the estate of the other spouse, its power is not limited to providing compensation for such benefits. Instead, the court is to do complete equity as between husband and wife and the children, having due regard to all obligations of the spouses and to the probable future necessities of all concerned. For the purpose of doing equity

> the court may award all the personal property to either spouse, and may subject the income, rents, or revenues of all real estate, belonging to either or both of the spouses, to the support of either or both of them, or to the education and support of the children.

(E)

THE HUSBAND HAS AT LEAST AS MANY MATERIAL RIGHTS OF DOMINION AND ENJOYMENT OVER COMMUNITY PROPERTY AND INCOME UNDER THE LAWS OF TEXAS AS HE HAS UNDER THE LAWS OF CALIFORNIA, AND HE SHOULD BE TAXED UPON THE ENTIRE COMMUNITY INCOME.

In *United States* v. *Robbins, supra,* this Court emphasized that under the laws of California as they then stood the husband alone had the disposition of the fund; that except for the restriction as to his making gifts, he could spend it as he pleased and the wife had no redress; that his liability for her support came from a different source and existed whether there was community property or not; and that the fund taxed was liable to be taken for his debts but was not liable to be taken for his wife's.

The powers of the husband in Texas are practically the same. There, as in California, at the time of the *Robbins case,* he may dispose of the community property, real and personal. There is no statutory restriction against gifts, such as exists in California, and there is no restriction as to the wife's joining in deeds and mortgages. See Civil Code of California, 1915, Sec. 172. He may spend

the community fund as he chooses provided that he does not deliberately defraud his wife. As in California, the wife has no redress so long as she continues to live with her husband and can not secure any portion of the community income or property for her own use except that she may contract for necessities and make the community property liable.

The one material difference between California and Texas appears to be that in Texas the community property, which consists of her personal earnings and the rents, dividends, and interest from her separate property, is made liable for her individual debts and is not liable for her husband's debts. In California such income, other than the wife's earnings, would constitute the separate income of the wife. As to all other community property, in both States such property is liable for the payment of the husband's debts but not for those of the wife. Moreover, the husband and his separate property are liable for the payment of community debts while the wife and her separate estate are not.

As to all community income other than the wife's earnings and the rents, dividends, and interest from her separate property the reasons for taxing the income to the husband are as compelling in the case of the Texas husband as in the case of the California husband. Nor do we think that the Texas wife's earnings and the rents, dividends, and interest from her separate property should be excluded

from the husband's return. The provision making them liable for her separate debts and exempting them from his does not remove them from his control. They remain community property and under the husband's control; and when intermingled with community funds they would of course be treated as any other part of the common fund. See McKay, Community Property, Section 298.

## CONCLUSION

The decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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SEPTEMBER, 1930.

# APPENDIX

## UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21-22, 37, 130, provides, in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum * * *. (U. S. C. App., Title 26, Sec. 951.)
>
> SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows * * *. (U. S. C. App., Title 26, Sec. 952.)
>
> SEC. 223. (a) The following individuals shall each make under oath a return stating

specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income be-

longed under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

TEXAS CONSTITUTION AND STATUTES

Constitution, Texas, Art. XVI:

SEC. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

Revised Civil Statutes, Texas, 1925, Vols. I and II.

ART. 1299. *Conveyance of separate lands of wife.*—The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608.

ART. 1300. *Conveyance of homestead.*—The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgment thereof taken and certified to before the proper officer, and in the mode pointed out in articles 6605 and 6608.

ART. 1983. *For wife's separate property.*—The husband may sue either alone or jointly with his wife for the recovery of the separate property of the wife; and, in case he fails or neglects so to do, she may sue alone by authority of the court.

ART. 1984. *Against husband and wife for necessaries.*—The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children and for expenses which may have been incurred by the wife for the benefit of her separate property.

ART. 1985. *For wife's debts, etc.*—The husband shall be joined in suits for separate debts and demands against the wife, but no personal judgment shall be rendered against the husband.

ART. 2578. *Community estate.*—Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased,

or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

ART. 2579. *Passes charged with debts.*—In every case, the community estate passes charged with the debts against it.

ART. 3661. *Community property.*—The community property of the husband and wife, except such as is exempt from forced sale, shall be liable for all the debts contracted during marriage. And, in the settlement of such community estates, the survivor, executor or administrator shall keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estates.

ART. 3662. *Where there is no child.*—Where the husband or wife dies intestate, or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community; and no administration thereon or guardianship of the estate shall be necessary.

ART. 3663. *When husband shall have management.*—Where the wife dies or becomes insane, leaving a surviving husband and child, or children, the husband shall have exclusive management, control and disposition of the community property in the same

manner as during her lifetime, or sanity; and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment to be taken to such conveyances, subject, however, to the provisions of this chapter.

ART. 3664. *Application for community administration.*—The husband shall, within four years after the death of the wife, or her being declared insane, when there is a child or children, file a written application in the county court of the proper county stating:

1. The death of his wife, or that she has been declared insane by a court of competent jurisdiction, and the time and place of her death or of such declaration.

2. That she left a child or children, giving the name, sex, residence and age of each child.

3. That there is a community estate between the deceased or insane wife and himself.

4. Such facts as show the jurisdiction of the court over the estate.

5. Asking for the appointment of appraisers, to appraise such estate.

ART. 3666. *Inventory, appraisement, etc.*—The surviving husband or wife (of community estates) with the assistance of any two of the appraisers, shall make out a full, fair and complete inventory and appraisement of the community estate; and the survivor shall attach thereto a list of all community debts due the estate, and shall also

attach thereto a list of all indebtedness due by said community estate to other parties, giving the amount of each debt and the name of the party or parties to whom it is due, and his or their post-office address; and such inventory, list of claims, and list of indebtedness of such community estate shall be sworn to by said survivor; and the inventory, appraisement and list of claims due said community estate shall be sworn to by said appraisers; and said inventory, appraisement, list of claims due said estate and list of indebtedness due by said estate shall be returned to the court within twenty days from the date of the order appointing appraisers in like manner as other administrations.

ART. 3667. *Bond of survivor.*—The surviving husband shall, at the time he returns the inventory, appraisement, and list of claims, present to the court his bond with two or more good and sufficient sureties, payable to and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one-half the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable to such person or persons as shall be entitled to receive the same.

ART. 3668. *Action of the court.*—When such inventory, appraisement, list of claims

and bond are returned to the county judge, he shall, either in term time or vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and, when approved, they shall be recorded upon the minutes of the court, and the order approving them shall also authorize such survivor to control, manage and dispose of such community property in accordance with the provisions of this chapter.

ART. 3669. *Survivor has control.*—When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court, shall have the right to control, manage and dispose of such community property as may seem for the best interest of the estate and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased; and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor.

ART. 3670. *Survivor shall keep account.*—The survivor shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of such community property; and, upon final partition of said estate, shall account to the legal heirs of the deceased for their interest in such estate, and the increase and profits of the same, after deducting therefrom all community debts, unavoidable

losses, necessary and reasonable expenses, and a reasonable commission for the management of the same.

ART. 3672. *Survivor to pay debts.*—The survivor shall pay all just and legal community debts as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.

ART. 3678. *Surviving wife.*—The wife may retain the exclusive management, control and disposition of the community property of herself and deceased or insane husband in the same manner, and subject to the same rights, rules and regulations as provided in the case of the husband and until she shall, in the event of the death of the husband, marry again, and in such event her right to manage, control and dispose of the community property shall cease; provided, however, that when no administration is had upon the estate of the deceased husband, as is provided under Article 3680, she may renew, and extend the maturity date, of valid existing debts of the community estate, and any lien securing same.

ART. 3680. *Rights of wife cease when.*—Upon the marriage of the surviving wife, she shall cease to have control and management of said estate or the right to dispose of the same; and said estate shall be subject to administration as in other cases of deceased persons' estates.

ART. 3681. *May have partition.*—After the lapse of twelve months from the filing of the

bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to have a partition and distribution thereof in the same manner as in other administrations.

ART. 4613. *Husband's separate property.*—All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal.

ART. 4614. *Wife's separate property.*—All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, the interest on bonds and notes belonging to her and dividends on stocks owned by her, shall be the separate property of the wife. The wife shall have the sole management, control and disposition of her separate property, both real and per-

sonal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law.

ART. 4615. *Compensation for personal injuries to wife.*—All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

ART. 4616. *Wife's separate property protected.*—Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband.

ART. 4617. *When wife may convey, etc.*—If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and the court, in term time or vacation, upon satisfactory proof that such

encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder.

ART. 4618. *Sale of homestead.*—The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property.

ART. 4619. *Community property.*—All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only. All the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved.

ART. 4620. *Community property liable for debts.*—The community property of the husband and wife shall be liable for their

debts contracted during marriage, except in such cases as are specially excepted by law.

ART. 4621. *Community property not liable.*—The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision.

ART. 4622. *Funds in bank.*—Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

ART. 4623. *Subject to debts of wife.*—Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.

ART. 4624. *Judgment and execution.*— Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff.

ART. 4626. *Application to be feme sole.*— Any married woman within this State may, with the consent of and joined by her husband, apply by written petition addressed to the district court of the county in which she may be a bona fide resident for judgment or orders of the said court removing her disabilities of coverture and declaring her feme sole for mercantile and trading purposes. Such petition shall set out the causes which make it to the advantage of said married woman to be so declared feme sole, and shall be filed and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her

own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her.

ART. 4627. *Rights of persons married elsewhere.*—The marital rights of persons married in other countries who may remove to this State shall, in regard to property acquired in this State, during the marriage, be regulated by the laws of this State.

ART. 4634. *Debts created after suit.*—On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

ART. 4635. *Inventory and appraisement.*—At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restraining him from disposing of any part thereof in any manner.

ART. 4638. *Division of property.*—The court pronouncing a decree of divorce shall also decree and order a division of the

estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

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Texas, General and Special Laws, Regular Session, 1927, Chapter 148:

(Title omitted.)

Be it enacted by the Legislature of the State of Texas:

That Article 4619, Chapter 3, of Title 75 of the Revised Civil Statutes of the State of Texas, 1925, shall be and the same is hereby amended so as to hereafter read as follows:

SECTION 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve-month period and until the husband returns to her and the affidavit hereinafter provided

for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

SEC. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a nonresident of this State at the time of such disappearance, or of any county in which the community property or part thereof is situated, in which petition the wife shall set forth the facts entitling her to control, manage, and dispose of the community property under the provisions of this article.

SEC. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

SEC. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of

general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall be not less than ten days prior to such date set for such hearing.

SEC. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage, and dispose of the community property under the provisions of Section 1 of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be accorded [recorded] in the deed records of other counties in which the property of said community estate may be situated.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

No. 84.

GEORGE C. HOPKINS, Collector of Internal Revenue,
*Petitioner,*
*v.*
C. W. BACON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR RESPONDENT.

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| The Revenue Act of 1926 taxed separately the net income of every individual. Also, with respect to husbands and wives, it affirmatively permitted each of them to make and be taxed upon separate returns. The statute itself, therefore, justified the separate returns made in this case. | |
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| Under the Constitution and laws of Texas and the decisions of its highest courts, the community income here involved, upon which the Respondent alone was taxed in this case, belonged jointly and equally to Respondent and his wife. Such Constitution, laws and decisions concerned matters of local property rights and the marital powers of Texas citizens, and are binding upon this court. | |
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| Respondent and his wife each had in the community income here involved such ownership and substantial rights as to authorize them under the Revenue Act, separately to return and be taxed upon their respective shares thereof. | |

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Fourth Contention ..... 53

The settled departmental and Congressional construction of the identical language of the successive Revenue Acts which preceded the 1926 Act was that husbands could not be required to return nor to pay taxes upon the wife's half of community income, and such construction became a part of the Act.

Fifth Contention ..... 61

It being settled law in 1927, binding upon this Court, that Respondent owned a part only of the aggregate community income received by him and his wife in that year, the taxation of Respondent upon his part thereof plus that of his wife, as contended for by Petitioner, would violate the Federal Constitution.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

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**No. 84.**

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GEORGE C. HOPKINS, Collector of Internal Revenue,
*Petitioner,*
*v.*
C. W. BACON, *Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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## BRIEF FOR RESPONDENT.

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### OPINIONS BELOW.

The opinion of the trial court in this case is reported in 27 Fed. (2d) 140 (Bacon v. Hopkins). The opinion of the Circuit Court of Appeals is reported in 38 Fed. (2d) 651 (Hopkins v. Bacon).

## JURISDICTION.

No question is made by Respondent as to the jurisdiction of this Court.

## STATEMENT OF THE CASE.

The statement of facts in the brief of the Petitioner substantially covers the case presented, except the facts showing the departmental practice and construction of the Revenue Laws in question; the legislative history of the United States income tax laws bearing upon the questions here involved; and Congressional approval of the departmental practices and construction. Such omitted facts will be more fully presented in their appropriate settings in succeeding pages of this brief.

It is sufficient here to say with reference to such facts that the taxing sections of the Revenue Act here involved (the Revenue Act of 1926) duplicated corresponding provisions in earlier revenue laws, all of which, before the enactment of the 1926 Act, had been construed by the Treasury Department and divers Attorneys General of the United States as entitling husbands and wives to make separate returns of their separate interests in community income; and Congress, on several occasions, refused to make any change in legislation with respect to the matters here involved. (R. pp. 27-32.)

## STATUTES INVOLVED.

The relevant constitutional and statutory material, national and local, will be found in the appendix (pp. 66 to 83).

## THE QUESTION PRESENTED AND THE POSITION OF RESPONDENT.

The question presented is: Whether under the language and the settled departmental and Congressional construction of the Revenue Acts and under the laws of Texas, a husband and wife domiciled in Texas in the year 1927 had the right separately to report and to be taxed separately upon their respective shares of community income received in that year. Both of the lower courts decided they had such right.

(Note: This case is a test case made necessary by action of the Treasury Department taken pursuant to recommendations in the opinion of Acting Attorney General Mitchell rendered July 16th, 1927, 35 Op. Atty. Gen. 265.)

Respondent contends in support of the decisions of the lower courts:

First. The Revenue Act of 1926 taxed separately the net income of every individual. Also, with respect to husbands and wives, it affirmatively permitted each of them to make and be taxed upon separate returns. The statute itself, therefore, justified the separate returns made in this case.

Second. Under the Constitution and laws of Texas and the decisions of its highest courts, the community income here involved, upon which the Respondent alone was taxed in this case, belonged jointly and equally to him and his wife. Such Constitution, laws and decisions concerned matters of local property rights and the marital powers of Texas citizens, and are binding upon this court.

Third. Respondent and his wife each had in the community income here involved such ownership and

substantial rights as to authorize them under the Revenue Act separately to return and be taxed upon their respective shares thereof.

Fourth. The settled departmental and Congressional construction of the identical language of the successive Revenue Acts which preceded the 1926 Act was that the husband could not be required to return nor to pay taxes upon the wife's half of community income, and such construction became a part of the Act itself.

Fifth. It being settled law in 1927, binding upon this Court, that Respondent owned a part only of the aggregate community income received by him and his wife in that year, the taxation of Respondent upon his part thereof, plus that of his wife, as contended for by the Petitioner would violate the Federal Constitution.

## ARGUMENT.

### Brief of Argument.

1. The Revenue Act of 1926, like all of its predecessors, levied an income tax upon the "net income of every individual." Husbands and wives were expressly required to file separate returns of their own incomes, and to pay taxes separately, unless at their option their aggregate incomes were reported in a joint return. Thus wives were expressly recognized as taxable persons and we need only inquire what part of community income in Texas, as to wives, came within the term "net income of every individual."

2. All of the income upon which the Respondent herein alone was taxed being revenues from com-

munity property, compensation for the husband's services, and revenues from the wife's separate property, was common (community) income of the husband and wife under the Constitution and laws of Texas, and the Petitioner in his brief so concedes.

3. Under the Constitution and laws of Texas, as well as the unbroken line of decisions of the Supreme Court of Texas, this common income belonged jointly and equally to husband and wife. Their respective rights attached at the same moment; Texas courts hold that these rights were "perfectly equivalent to each other," present and vested; and that they continued so throughout the marriage and through all the mutations the property might undergo.

4. The holding that the wife was a present and equal owner in community income was coupled with and predicated upon statutes and decisions which afforded her all those substantial rights necessary to fulfill the fundamental conceptions of ownership. Those fundamental attributes present were:

(a) The entire community property was liable for all of the obligations of the wife, incurred before or after marriage, arising from contract, tort, or otherwise, with the sole exception that, as to contractual liabilities incurred after marriage (other than for necessaries) a part of the community property was not liable unless the husband joined in the execution of the contract. Petitioner has confused limitations upon the wife's contractual capacity with liability for her legal contracts.

(b) That portion of the community property which consisted of revenues from the wife's separate property and her personal earnings was expressly exempted from the husband's obligations and made subject to all her valid contracts.

(c) Since 1913 management and control of the property of married persons and their income has depended upon the source and character of the income. The wife's personal earnings and all revenues from her separate property, though community income, were under her exclusive control. Petitioner's suggestions to the contrary are predicated upon a fallacious conception of the Texas statutes and the effect of the amendment passed in 1927. The homestead was under the control of both. The husband's earnings and the accumulations other than from property under the control of the wife or her earnings were controlled by him. Regulations as to control were, and are, statutory and were, on several occasions, changed by the Legislature under Constitutional sanctions, authorizing the Legislature to define the rights of the spouses in their common property, thus demonstrating that control was not an attribute of ownership.

(d) In case of abandonment by the husband, or his incapacity, the wife acquired entire freedom of contract and the unrestricted power to manage, control and dispose of the entire community property. Such right has always existed.

(e) As to that part of the community property which was under his control, the husband acted as managing partner and was restricted to the

scope of the marital partnership. The discretion granted him, though broad for reasons of "public policy and social economy" did not permit him to make any disposition which resulted in a fraud on the wife's rights. The fraudulent result need not have been intended, as contended by Petitioner. The wife could, by injunction, have prevented such a disposition, and where the doctrine of innocent purchaser did not forbid, recover the property, or have reimbursement from the husband.

(f) The wife, whether she predeceased her husband or not, might dispose of an equal share of the community property by will in any way that she saw fit. The husband had a like right. Neither could make any testamentary disposition of the other's share binding upon such other. In intestacy, whether or not the wife predeceased her husband, one-half of tthe community property descended to her heirs-at-law. Her heirs were (1st) her children by that or any other marriage or their descendants, if any; (2nd) if none, the husband, if living, and if not (3rd) her surviving ancestors and collateral kindred. Rules of descent as to the husband's share were the same; the wife becoming the beneficiary of the descent of his property, in the absence of his children or their descendants, him surviving.

(g) Upon the death of the husband, the wife had the right to administer upon the entire community property in preference to the husband's representatives. Such right continued as long as she remained a widow, and if she remarried

and such new relationship was later terminated, she might at will, resume the administration. The rights of the husband were the same, except that his remarriage did not interrupt his administrative powers.

(h) Upon the death of the wife an inheritance tax was imposed by the state upon her one-half of the community property, whether it passed by her will or by descent to heirs. The same was true as to the devolution of the husband's share. The same was true in both cases as to the Federal estate tax.

(i) Upon divorce the spouses held community property as tenants in common unless the court granting the divorce divided it between them. In the proper exercise of its discretion, the court might award a larger portion of the community property to the more dependent spouse, usually the wife, but it could not divest the title to real estate. Such judicial power was not intended to be a limitation of the ownership of either spouse in community property. Such was evident from the fact that it extended to and was freely exercised by the courts, with respect both to the separate property of each spouse and to community property.

(j) While ordinary litigation respecting the community property was conducted by the husband and in his name, the wife was an actual party through representation and was bound as such and subject to all statutory restraints applicable to formal parties. Where necessary for

the protection of her rights in community property, she could sue her husband or litigate alone with third parties. Her allowable absence from the litigation was a privilege to her and not indicative of want of interest in her. Such appeared from the circumstance that her coverture must be advanced as a defense.

5. The relation of the spouses to the community property and their rights therein were very similar to those of partners. It is the cherished policy of the Texas courts to regard the relationship as a special or marital partnership. The system is best understood when viewed in that light. References to the trust theory in certain Texas decisions mentioned in Petitioner's brief raise no inconsistency between that theory and the partnership principle here mentioned. The trust references in each case were made in discussions of and with reference to record titles in one spouse or the other, the individual interest even in those cases being recognized as being equally owned by each spouse as asserted in the marital partnership cases.

6. Since the wife in Texas was, as above shown, the equal owner with her husband of community income, and since the Texas laws and decisions afforded her all of the substantial rights involved in the fundamental conceptions of ownership and since the Revenue Act of 1926 imposed the tax upon "the net income of every individual" whether the income was derived from a partnership or otherwise, and since the law expressly recognized the wife as a taxable person with the right to file a separate return; it necessarily

followed that she, and not her husband, was rightfully taxed upon her one-half of the community income.

7. The Treasury Department and the Attorney General in 1920 ruled officially that the rights of the wife in Texas in community income were of such a nature as that one-half thereof was her income within the purview of the taxing acts, requiring her to report it and pay taxes thereon and that the husband could not be required to report it and could not be taxed upon it. Such rulings were continued by successive administrations. Separate returns of community income are still accepted by the Treasury Department subject to the outcome of this test suit. The wife's ownership and rights with respect to community property have been substantially the same continuously since 1920.

8. Congress expressly approved and adopted the above mentioned construction of the Revenue Acts, when, in considering the 1921 and 1924 Acts, it rejected amendments particularly aimed at requiring the husband to report and pay taxes on the entire community income. In those Acts and the 1926 Act under consideration here, Congress readopted the identical taxing language which had been so construed. This showed conclusively that Congress did not intend to tax to the husband the wife's half of the community income. Such intention must govern.

9. Unless it can be and is determined by this court that, notwithstanding the Constitution and laws of Texas and the decisions of her courts, community income in Texas was, in fact, the net income of the

husband alone, the taxation to the husband of the entire community income both of himself and of his wife as a part of his income at progressive rates would render that portion of the statute complained of here unconstitutional, in that, (a) it would be, in part, a direct tax not based alone on the income of the person taxed and not apportioned, (b) the tax would be not geographically equal and uniform, and (c) the basis (that is, the adding of the wife's share of community income to his share of the community income, plus any separate income which he might have) would be so arbitrary and capricious as to constitute a taking of the taxpayer's property without due process.

**First Contention.**

**The Revenue Act of 1926 taxed separately the net income of every individual. Also, with respect to husbands and wives, it affirmatively permitted each of them to make and be taxed upon separate returns. The statute itself, therefore, justified the separate returns made in this case.**

There is no support whatever in the law for the statement made by Petitioner at page 17 of his brief, that "The family is the social and economic unit upon which the burden of the tax must fall." There is as little warrant for the deduction from that erroneous premise that the purpose of the Revenue Act is thwarted if married persons in Texas are taxed upon their community incomes while in other states where community incomes do not exist they are not taxed upon them.

Sections 210 and 211 of the Revenue Act of 1926

imposed a tax "upon the net income of every individual.'"[1]

Section 216 of the Act allowed credits and exemptions to "the head of a family or a married person living with husband or wife." It provided:

> "A husband and wife living together shall receive but one personal exemption * * * If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them."[1]

Section 223 of the Act provided for a return under oath by:[1]

> "Every individual having a net income for the taxable year of $3500 or over, if married and living with husband and wife, * * * If a husband and wife living together have an aggregate net income for the taxable year of $3500 or over, or an aggregate gross income for such year of $5,000 or over, (1) each shall make such a (separate) return, or (2) the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

The only sections of the Revenue Act which petitioner could claim imposed the tax here in controversy were sections 210 and 211. Taxation under those sections was limited to "the net income of every individual" separately considered and was confined in each case to the net income of the taxed individual. The tax here involved was, in fact, imposed under such sections.

[1] Set out in full in appendix pp. 66-67.

The sections mentioned did not extend to nor provide for taxing several individuals jointly for an income in which such several individuals had fractional interests, nor for taxing any one of such individuals for his own share plus the shares or interests therein owned by persons other than himself.

Other sections of the Revenue Act extended to and taxed, under defined circumstances, certain specified aggregate incomes, such as the income of unincorporated associations,[1] the income of estates and some trusts,[2] and, formerly, the income of partnerships.[3] Such aggregations were taxed as aggregates, however, only because their taxation as aggregates was affirmatively and accurately provided for under sections of the act involved in this case, other than those relied on by Petitioner in this case.

Therefore, since the income taxed in this case was not, in its entirety, the net income of Respondent, but partly his and partly his wife's, it was not taxable in its entirety to him under sections 210 and 211, or any other sections of the Act, and since such income was not the income of an association or trust or any other aggregation specifically provided for in the Revenue Act, it was not taxed as a unit by any other provisions of the law.

The Revenue Act itself in several of its sections affirmatively recognized the wife to be a taxable subject[4] and in section 223 affirmatively provided for the right of husbands and wives in all the states either to make separate returns, each reporting and each

[1] Sec. 2 (a) (2), Sec. 230, Revenue Act of 1926.
[2] Sec. 219. Revenue Act of 1926.
[3] Excess Profits Tax of 1917.
[4] Sec. 216. Appendix, pp. 66-67.

being taxed for his or her individual income, unless, at their option, they elected to aggregate their incomes and return them and have them taxed as one income. The option given so to do was an option given to taxpayers and was not conferred upon or reserved to the Government.[1]

This option is comparable to a similar option[2] given by the Act to affiliated corporations or associations to file a joint return but was, of course, only availed of in those cases where it would reduce the tax. Even partnership income was not taxed as an aggregate under the 1926 Act, although, in certain earlier revenue acts, such incomes were so taxed. On the contrary, the 1926 Act affirmatively provided for an informational return as to partnership incomes, but for taxes to be laid only upon each partner's "distributive share, whether distributed or not, of the net income of the partnership."[3] In all respects it treated each partner's share of the income of a partnership in the same manner as his individual income exclusively proceeding from his own exertions or from his own property.

The taxing language in the 1926 Act of the sections which have been referred to has been substantially identical in the various successive revenue acts which, first passed in 1913,[4] have from time to time since

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[1] Cf. *Rose vs. Grant*, 39 Fed. (2nd) 340; *Buttolph v. Com.*, 29 F. (2d) 695; *Alameda Investment Co. v. McLaughlin*, 33 Fed. (2d) 120.

[2] Sec. 240, Revenue Act of 1926.

[3] Sec. 218, Revenue Act of 1926. Appendix page 67.

[4] Secs. 210, 211, 216, 223, Revenue Act of 1924;
Secs. 210, 211, 216, 223, Revenue Act of 1921;
Secs. 210, 211, 216, 223, Revenue Act of 1918;
Sec. 1 (a), (b), 7 (a), 8, Revenue Act of 1916;
Sec. 1 (a), (2), C. and D., Revenue Act of 1913.

been reenacted. Since 1914 the tax agencies of the Government consistently have recognized the separate taxability of the wife's income[1] and since 1920 have affirmatively ruled that the husband could not be required to return or be taxed upon the wife's share of community income.[2]

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**Second Contention.**

**Under the Constitution and laws of Texas and the decisions of its highest courts, the community income here involved, upon which the Respondent alone was taxed in this case, belonged jointly and equally to Respondent and his wife. Such Constitution, laws and decisions concerned matters of local property rights and the marital powers of Texas citizens, and are binding upon this court.**

It is conceded by Petitioner in his brief in this case that all of the income here involved was the community income of Respondent and his wife under the Constitution and laws of Texas and the decisions of the highest Texas courts, and that the interest of each—husband and wife—was "vested" and not "expectant." It is insisted however that the wife was not entitled to return separately and to be taxed separately upon her share of it, and it is insisted by Petitioner that the husband may be taxed not only for his share of the income but for his wife's share also.

Petitioner's contentions just stated place Respondent under the necessity of outlining to this court the constitutional and statutory provisions and the

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[1] Treasury Decision No. 2090, Treasury Decision No. 2137.
[2] Treasury Decision No. 3071, 3 C. B. 221.

Texas decisions which show the real, actual, vested, substantial and present nature of the wife's ownership of her equal share of community income.

The present Constitution of Texas (in force since 1876), refers to "all property, both real and personal of the wife,"[1] and provides that "laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property *as that held in common with her husband,*" thus clearly recognizing the wife's ownership of community property as well as her ownership of separate property. Pursuant to the Constitution, laws were passed at an early date defining "the rights of the wife in relation * * * to * * * property * * * held in common with her husband."

Under the Texas Constitution and laws, all acquisitions of either husband or wife during marriage, whenever or however derived, were and are the *common* and equal property of both of them, except such acquisitions as came through "gift, devise or descent," and except the "increase" of lands so derived (that is, derived through "gift, devise or descent") and increase of lands owned at marriage or acquired subsequent to marriage through "gift, devise or descent."[2] "Increase" of lands referred to means not crops, rents, etc., produced from such lands, but physical accretions to such lands or their appreciations in price when sold.[3]

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[1] Sec. 15, Art. 16. Texas Constitution. Appendix page 68.

[2] Arts. 4613, 4614, 4619. Texas Statutes (Appendix pp. 74, 76. *Arnold vs. Leonard,* 114 Tex. 535.

[3] *Arnold vs. Leonard,* 114 Tex. 535; *Dixon vs. Sanderson,* 72 Tex. 359.

It is obvious that neither husband nor wife can have any incomes other than their community incomes, except such rare gains as are "increase" of lands. Legislative attempts to enlarge the wife's separate income have been held unconstitutional by the highest Texas courts.[1]

Virtually all imaginable acquisitions of either husband or wife in the shape of income are community income—the wife's personal earnings, crops from her lands, dividends on her stocks, interest on her money and increase of her live stock. The same is true as to corresponding acquisitions of the husband. The social policy of our people has been to deal exact, even-handed and equal justice to husband and wife recognizing them to be in all substantial respects equal marital partners.

Such is briefly expressed in the following statements of the Supreme Court of Texas:

> "Their rights of property in the effects of the community are perfectly equivalent to each other."[2]
>
> "Her right in that property (community property) is equal to that of the husband."[2]
>
> "Under the law as now settled by the former decisions of this Court, the titles of the husband and wife to the community are equal."[3]
>
> "In this state the beneficial interests of the husband and wife in community property are

[1] *Arnold vs. Leonard, supra; Northern Texas Traction Co. vs. Hill,* 297 S. W. 778; *Teague vs. Fairchild,* 15 S. W. (2nd) 585 (Com. of Appeals.

[2] *Wright vs. Hays,* 10 Tex. 129.

[3] *Zimpleman vs. Robb,* 53 Tex. 274-282.

> equal, whether the grant or deed to the property be in the name of only one of them or to them jointly.'"[1]

A very recent expression of the Supreme Court upon the subject is:

> "These conclusions harmonize with the conception underlying the Texas decisions that the wife's capacity to own and hold property is as complete as that of the husband; that each marital partner owns an estate in the community property equal to that of the other partner."[2]

In the decision last quoted from, the Supreme Court of Texas cited and quoted from two important decisions of this court: *Warburton vs. White,* 176 U. S. 484; *Arnett vs. Reade,* 220 U. S. 311.

These long established rules of property were expressly recognized and followed by the United States Circuit Court of Appeals in this case, and were followed in *Bek vs. Miller,* 8 Fed. (2nd) 797. The same rules were approved by this Court in a case appealed from the State of Washington case, *Buchser vs. Buchser,* 231 U. S. 157.

The Supreme Court of the United States has always recognized the binding effect of decisions of the state court establishing rules of property and interpreting local constitutions and statutes affecting property, marital relations, and the powers of citizens over

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[1] *Burnham vs. Hardy Oil Co.,* 108 Tex. 555-564.

[2] *Arnold vs. Leonard,* 114 Tex. 535. A few of the many holdings to the same effect; *Taylor vs. Murphy,* 50 Tex. 291; *Patty vs. Middleton,* 82 Tex. 586; *Wheat vs. Owens,* 15 Tex. 242; *Routh vs. Routh,* 57 Tex. 589; *Jones vs. State,* 5 S. W. (2nd) 973; *Kirkwood vs. Domnau,* 80 Tex. 645.

property and income within the state. A very late expression of the Supreme Court on the subject is:[1]

> "Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state court. For that reason, Federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts. (Citing cases) * * * But where the rule is one affecting title to real estate within the state and has been repeatedly determined by decisions of said courts, so that it is established as the law of the state, there has been no departure from the rule that the Federal courts will follow the decision of the state courts (citing cases), and this is the rule, even though the state rule is not approved."

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**Third Contention.**

**Respondent and his wife each had in the community income here involved such ownership and substantial rights as to authorize them under the Revenue Act, separately to return and be taxed upon their respective shares thereof.**

It seems to us convenient to discuss this contention in connection with Petitioner's assertions concerning the laws and decisions underlying this contention, which immedately follow.

Petitioner asserts that the wife's alleged ownership is insubstantial and unreal and not such as to entitle

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[1] *Hines Yellow Pine Trustees vs. Martin*, 268 U. S. 458, 464. Also *DeVaughn vs. Hutchinson*, 165 U. S. 566, 570; *U. S. vs. Loan and Building Co.*, 278 U. S. 55.

her separately to return and be taxed upon her one-half of community income. Petitioner relies upon six points. Apparently he concedes or actually admits that all other attributes of ownership in the wife existed. His six points are:

(a) *That the husband alone has unrestricted power to contract, litigate concerning, and dispose of community property; except that he may not give it away with deliberate intent to defraud his wife.*

(b) *That community property and the husband's separate property are all liable for community debts incurred by the husband.*

(c) *That the wife is without power to contract or litigate concerning community property, except where the husband abandons her or is insane.*

(d) *That the wife cannot obtain a division of community property except in divorce proceedings, and then is without assurance that she will receive her one-half of community property.*

(e) *That a surviving husband's responsibility as community administrator are greater than the surviving wife's responsibilities in similar circumstances.*

(f) *That the husband's powers over community property and income, under Texas laws, are as substantial as under California laws.*

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Respondent submits that the points made by the Petitioner are not correct in fact or law when tested

by the Constitution and laws of Texas and the decisions of her courts, and that, when they are brought under the acid test of comparison with the body of our laws, what little fragments as remain of the points, are, themselves, fairly trivial and insubstantial.

This Court has not agreed with Petitioner that the wife's interest in community property and income is negligible. On the contrary, it has said, *Arnett vs. Reade,* 220 U. S. 311:

> "It is very plain that the wife has a greater interest than the mere possibility of an expectant heir, for it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for alienation made in fraud of her by her husband. * * * We should require more than a reference to * * * as to the power of the legislature over an inchoate right of dower to make us believe that the law could put an end to her interest without compensation consistently with the Constitution of the United States."

and again in *Warburton v. White,* 176 U. S. 484:

> "The argument is that the provision in the statute giving the administration and disposition of the community property to the husband operated to destroy the community system and to render it impossible under the statute for community or common property to exist. In other words, the interpretation relied upon asked us to say that, because of a provision which merely pointed out how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about

> a result which was contrary to its express language providing for the existence of the community system."

As pointed out elsewhere in this brief, the Texas courts have not agreed with petitioner as to the insubstantial nature of the wife's title and interest in community property and income.[1] In a very recent case (*Atkins v. Davis,* 291 S. W. 968), a Texas Court of Civil Appeals declared that the nature of her title and interest was such "as brings her estate within the well recognized definitions of a freehold estate." The courts of both sovereignties have elaborately pointed out that powers of management and control are simply social machinery for the administration of family property and income and are distinct from matters of title, ownership and estate.

*Arnold v. Leonard,* 114 Tex. 535. (Quoting with approval *Warburton v. White, supra.*):

> "The Legislature could as well have provided that the wife could convey as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of conveyance did not alter the status of ownership. It could not make the interest of either spouse in community land greater or less."

Continuing, the Texas Supreme Court in that decision said that the Legislature

> "could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and

[1] See pp. 16 to 18 hereof.

> portions of the community which were derived from the use of the wife's separate property or from her personal exertions."

An admirable statement of the principle is found in an Idaho case (*Kohny vs. Dunbar,* 21 Idaho 258):

> "The statute therefore, intends that all property acquired by either the joint effort of the two members of the community or their individual and separate effort shall constitute a community fund and estate. The lawmakers evidently thought it wise and expedient in the interest of business and commercial transactions that this community have a business and managing agent * * * The statute, however, has given to the husband no better or higher title to the community property than it has given to the wife."

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It is not correct to say, as asserted by Petitioner, that the husband alone has unrestricted power to contract and litigate respecting community property and unrestricted power of disposition, except that he may not give it away with the deliberate intent to defraud his wife.

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A correct statement is that, in ordinary circumstances, the husband has the right as agent of the community to make contracts and to control litigation affecting *certain items,* and certains items only, of community income, and to convey *certain items,* and certain items only, of community property, except, however, that he may not dispose of it under circumstances which, regardless of his intent, would operate to defraud the wife of her community interest therein.

The community agency powers over community property and income are distributed by the Texas statutes between the husband and wife; the husband's powers being limited, (a) to his personal earnings, and (b) to income from his separate property; the wife's powers being, in like manner, limited, (a) to her personal earnings,[1] and (b) to income from her separate property.[2] If such separate items of community income become indistinguishable through voluntary commingling or mutations, the husband's ordinary powers extend to the commingled mass.

It appears correctly to be admitted by Petitioner that the 1925 Code did not operate to disturb the foregoing distribution of powers between husbands and wives, but he asserts that an amendment made by the Legislature in 1927 to Art. 4619 of the Code.[3] (adding to the language of that statute, as it already existed, a provision relative to the wife's powers in case of her being abandoned by the husband) must be construed as destroying all other Code provisions which gave the wife community agency powers over her earnings, and income from her separate property.

The amendment in question became effective about midyear 1927. Its purpose simply was to provide machinery by which the wife in case of the husband's

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[1] The Petitioner's contention that the wife does not have control of her personal earnings is effectively refuted by *In re Gutierrez*, 33 Fed. (2nd) 987 (Texas) and authorities there cited.

[2] Arts. 4613, 4614, 4616, 4617, 4620, Texas Statutes, pp. 74 to 76. Appendix. *Gohlman, Lester & Co. vs. Whittle*, 114 Tex. 548; *Tannehill vs. Tannehill*, 171 S. W. 1050.

[3] Acts of 40th Legislature (1927), Chap. 148, page 219. Appendix page 81.

disappearance and unknown whereabouts, might make proof of the facts to a court and be substituted completely for him in general management of community business. The caption so stated, the body of the Act so stated, and no attempt was made in the amendment to qualify or modify in any respect the other provisions of the Code, which, by continuing the legislation of 1913, 1917 and 1921,[1] distributed the community agency powers between husband and wife. The amendment would be limited to the new matter stated in the caption, under the Texas Constitution.[2] It would be limited to the new matter at which it was obviously aimed, under common and well recognized principles of statutory construction.

Petitioner insists that his view that this statute destroyed all of the wife's community agency powers provided for in the 1925 Act and in the laws passed in 1913, 1917 and 1921, must be adopted, else that an ambiguity is created. His position is, substantially, that if the legislature had desired to restore the wife's right to manage and control the rents, interests and dividends from her separate estate, it would no doubt have done so. Such rights of the wife, however, already existed before the 1927 amendment to Art. 4619. They needed no restoration.[3] It is Petitioner's contention which would create a conflict and produce the "ambiguity" and, taking his contention at its face, a pla. ambiguity would be created between that section as reenacted and other

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[1] See History of Texas Statutes on subject. Appendix pp. 69 to 73. *Gohlman, Lester & Co. vs. Whittle*, 114 Tex. 548. *Arnold vs. Leonard*, 114 Tex. 535.

[2] *Arnold vs. Leonard, supra.*

[3] *Gohlman, Lester & Co. vs. Whittle*, 114 Tex. 548. See, also, *Beaver-Electra Refining Co. vs Cauble*, 115 Tex. 1.

sections of the statute which freed the wife's earnings and the revenues from her separate property from liability for community obligations created by the husband.[1] There are no decisions supporting Petitioner's interpretation of the 1927 amendment. And there are express decisions and statutes recognizing the exemption of such income from liability for the husband's debts and subjecting it to her debts (*Gohlman vs. Whittle*, 114 Tex. 548, Art. 4614 Tex. Rev. Stat.) The statute has been held to give her "complete management and control" of her personal earnings. (*In re Gutierrez*, 33 Fed. (2nd) 987).

That the contractual powers of the husband were solely an agency, so far as the wife's one-half interest in community property and community income were concerned, is demonstrated by the consequences upon his powers, of his abandonment of the wife or of his insanity. In either case, she became the managing agent of the community. It was never contended that her succession to the agency would operate to destroy the husband's ownership of his one-half of the community property and the community income. His rights continued throughout his absence or incapacity just as hers continued throughout his presence and agency activities for their common benefit.[2]

The Petitioner contends that the sole limitation upon the husband's agency power was that he might

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[1] Arts. 4616, Texas Statutes. Appendix 75.

[2] *Wright vs. Hays*, 10 Tex. 129; *Zimpleman vs. Robb*, 53 Tex. 274, Acts of 40th Legislature, amending Art. 4619, Texas Statutes, page 81, Appendix. The fact that in certain circumstances, the wife's rights can be cut off by a sale to an innocent purchaser is of no particular importance. The fact that the doctrine was applied to the wife's interest shows that she was an owner of that interest.

not give away community property with the deliberate intention of defrauding his wife.

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Such statement of the limitation is incorrect. The true rule was that the husband, as to that portion of the community committed to his control, had a broad discretion placed in him for reasons of "public policy and social economy,"[1] but he could not overstep the bounds of good faith. The earliest case upon the subject said that "excessive, capricious or fraudulent" donations and sales would be void and that the wife had her remedy.[2] He could not by any means convert community property into his separate property.[3] His acts must have been untainted with fraud. He could not give community property to his paramour.[4] Where the husband neglected or fraudulently refused to sue for damages to the wife's reputation—community property—she was allowed to sue.[5] Her community interest was protected under the statutes which made void any conveyance to defraud creditors "or other persons of or from what they may be lawfully entitled to."[6] When necessary for the protection of property rights, the wife could sue the husband or third parties.[7] Her remedies included the right to require the husband's separate property to account for community funds

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[1] *Taylor vs. Murphy*, 30 Tex. 291.

[2] *Stramler vs. Coe*, 15 Tex. 211.

[3] *Martin vs. Moran*, 32 S. W. 904; *Krenz vs. Strohmeir*, 177 S. W.

[4] *Watson vs. Harris*, 130 S. W. 237; *Coss vs. Coss*, 207 S. W. 127.

[5] *Davis vs. Davis*, 186 S. W. 775.

[6] *Bicocchi vs. Casey Swasey Co.*, 91 Tex. 259. Art. 3996 Texas Statutes, page 80, Appendix.

[7] *Vercelli vs. Provenzano*, 28 S. W. (2nd) 316. See also *Gardenshire vs. Gardenshire*, 172 S. W. 726, *Shaw vs. Shaw*, 111 S. W. 223; *Coss vs. Coss*, 207 S. W. 127; *Dority vs. Dority*, 96 Tex. 215; *Miller vs. Miller*, 285 S. W. 837; *Lamar & Smith vs. Stroud*, 5 S. W. (2nd) 824.

used and, in proper cases, to recover property transferred to third parties, as well as to injunction and receivership.[1] All of this was without the necessity of instituting divorce proceedings or otherwise disrupting the marital relationship.

Such conduct as purchasing endowment insurance with community funds payable to the separate estate of the husband[2] and using community funds to improve the separate estate of the husband gave rise to protective actions by the wife.[3] An attempted gift of community property by the husband to the son of a prior marriage was held ineffective and the son declared a trustee for the benefit of the community.[4] The husband was permitted to expend a small amount of community funds for the purpose of paying premiums upon insurance payable to the child of a prior marriage, but the court indicated that the wife could have recovered her equal share of the premiums so paid.[5] *Coss vs. Coss*, 207 S. W. 127, expressly recognized the right of the wife to sue to protect the community property from fraudulent disposition, even though her residential status was such that she could not bring a suit for a divorce.[6]

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[1] *Vercelli vs. Provenzano*, 28 S. W. (2nd) 316. See also *Gardenshire vs. Gardenshire*, 172 S. W. 726, *Shaw vs. Shaw*, 111 S. W. 223; *Coss vs. Coss*, 207 S. W. 127; *Dority vs. Dority*, 96 Tex. 215; *Miller vs. Miller*, 285 S. W. 837; *Lamar & Smith vs. Stroud*, 5 S. W. (2nd) 824.

[2] *Martin vs. Moran*, 32 S. W. 904.

[3] *Furrh vs. Winston*, 66 Tex. 521, 525; *Rice vs. Rice*, 21 Tex. 58-66; *Maddox vs. Summerlin*, 92 Tex. 483, 487; *Pellum vs. Fleming*, 283 S. W. 531, 534, *writ refused*, 287 S. W. 492. See also *Speer's Law of Marital Rights in Texas*. 3rd Edition, pars. 504, 505, for a treatment of the doctrine of reimbursement.

[4] *Krenz vs. Strohmeir*, 177 S. W. 178.

[5] *Rowlett vs. Mitchell*, 114 S. W. 845.

[6] Fraudulent result, not intent is the test, *Martin vs. McAlister*, 94 Tex. 567. "The statute empowering the husband to manage the wife's separate lands and community assets make the husband essentially a trustee accountable as such to the separate estate of the wife as to the community." *Arnold vs. Leonard*, 114 Tex. 535.

Any restrictions which existed upon the wife's right to submit a controversy with her husband or third parties regarding property rights to a court for determination prior to the institution of a divorce action, should not militate against her actual ownership. They were for her protection and in the interest of family harmony. Rules much more stringent in their application prevent one partner from suing another or a third party with regard to partnership property, except in connection with a suit for dissolution and accounting,[1] yet it never has been suggested that such rule destroys or lessens the actual ownership of either partner in partnership property. A much more basic public policy forbids the litigation of comparatively trivial differences between marital partners by making, when exercised in good faith and free of fraud, the husband's determination as to some property, the wife's as to other, final and conclusive; but, at the same time, leaving all judicial remedies open to prevent substantial wrong.

That the husband's presence as a party in litigation under his control is not because of his exclusive interest or title, but as a representative of the community itself, is further illustrated by the Texas decisions forbidding parties to suits in certain circumstances testifying to transactions with certain decedents. In such cases it has been uniformly held by the Texas courts that the prohibition against so testifying extends to the wife, though she be not a formal party to the suit. This, because of her interest, equal with her husband's, in the subject matter of the litigation, viz., community property. Such

[1] 20 Ruling Case Law, pp. 924-5. Sec. 139, "Partnerships."

extension of the statute to her was limited to community property cases. It did not extend to cases which involved only the husband's separate estate.[1]

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It is not true, as asserted by Petitioner, that community property (if, by this, is meant all community property) is made liable for the payment of all debts created by the husband.

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Our statutes expressly exempt from the husband's debt-incurring activities the wife's separate earnings, damages for personal injuries to her, and income from her separate property, although all those items of income accrued to the community.[2]

All community property was expressly made subject to the debts of either spouse incurred during marriage, unless specifically exempted.[3] The statutory exemptions were, in part, based upon the wife's limited contractual capacity,[4] without her husband's joinder, and, in part, upon the powers of control of either spouse over particular portions of the community income. The exemption of the revenues from the wife's separate property and of the wife's earnings from liability for the husband's debts[5] and

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[1] Cf. *Simpson vs. Brotherton*, 62 Tex. 170; *Gilder vs. City of Brenham*, 67 Tex. 345.

[2] Art. 4616, Statutes, page 75.

[3] Art. 4620, Texas Statutes, page 76. Appendix.

[4] Art. 4621, Texas Statutes. Limitation on the wife's contractual power are to protect her and her property, not to deprive her of it. *Red River National Bank vs. Ferguson*, 109 Tex. 287.

[5] In re Gutierrez, 33 Fed. (2nd) 987. (Texas) holds that a wife may collect for personal services rendered under contract with the husband in his business from the husband's bankrupt estate.

their subjection to her debts, are plainly not intended as limitations on the husband's contractual powers, as such, nor as an enlargement of her contractual powers, but instead are intended as a recognition of her equal ownership in community property.

Community property likewise is made liable for the payment of any liabilities created by the wife: (a) All prenuptial contract debts[1] (b) all prenuptial and all post nuptial torts,[2] (c) necessaries for herself and children,[3] (d) contractual debts created by her, her husband joining,[2] and (e) her personal earnings and the income of her separate property for all her contract debts and obligations in tort.[4]

In other words, virtually and substantially all her debts are collectible from various items of community income, as his are. Even more can be claimed. There is no debt which the husband can create which is exigible against all items of community income. There are debts which the wife can create which are so exigible.[5]

A particularly interesting case involving a debt created by both husband and wife is *Cullum vs. Lowe,* (9 S. W. (2) 70), in which the wife's half of community property was subjected to the entire debt, although the husband had been discharged therefrom in bankruptcy proceedings.

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[1] *Portis vs. Parker,* 22 Tex. 669; *Taylor vs. Murphy,* 50 Tex. 291; *Lee vs. Henderson,* 75 Tex. 193.

[2] *Patterson and Wallace vs. Frazer,* 93 S. W. 146.

[3] Art. 4621, Tex. Statute. Appendix 76.

[4] Art. 4616, Texas Statutes. Appendix 75.

[5] Necessaries for herself or her children. Arts. 4621, 4623, Statutes. Appendix, pp. 76-77.

No obstacle to the collection of Federal income taxes from any community property or from the wife's separate property existed in 1927 or now exists.[1] The right to enforce the collection of incomes taxes even as against the homestead in Texas has been upheld.[2]

If the taxation of community property and income, therefore, is to be determined by the right to subject it to the payment of the debts and torts of husband and wife, whether they be joint or several obligations, what comfort can Petitioner draw from the foregoing?

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It is only partly true that the wife cannot obtain division of community property except in divorce proceedings and then is without assurance that she will receive her one-half of the community property, as asserted by Petitioner.

It is true, the marriage relationship continuing, that the wife cannot compel a partition of community income and community property generally. Neither can the husband. Texas has made no provision for partial disruption of the marital partnership. The same is true as to business partnerships. Yet, it has never been conceived, because a business partner was not privileged to break up the business partnership, while at the same time continuing it,

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[1] Statutes providing that certain property shall not be liable for contractual obligations do not apply to statutory ones. Cf. *Christopher vs. Norvell*, 201 U. S. 216; *Keyser vs. Hitz*, 133 U. S. 138; *Chapman vs. Brown*, 278 S. W. 869; *Chapman vs. Pettus*, 269 S. W. 268; *Austin vs. Crim*, 299 S. W. 322; 6 S. W. (2nd) 348, dealing with the liability of married women as share holders in State and National Banks.

[2] *Staley vs. Hopkins*, 9 Fed. (2nd) 976. See also *U. S. vs. Howell*, 9 Fed. 674; Internal Revenue Cumulative Bulletin, June, 1923, p. 172.

that, therefore, he had no property interest in partnership earnings, partnership income and partnership property.

The marital partnership continuing, there would be no point in a partition of its community assets, for after partition the husband and wife severally would have those statutory powers with reference to the community property which they enjoyed before the division was made, and would, as before, participate in the earnings from the divided property, and the personal earnings of either. *Arnold vs. Leonard,* 114 Tex. 535.

It does not follow, however, that because our laws do not provide for any such an anomalous and fruitless proceeding as a division of the property of the marital partnership, while the marital partnership continues, that the wife is denied legal protection of her equal one-half interest in common property and common income.

In *Dority vs. Dority,* 96 Texas 215, arising before the husband was deprived by the Statute of 1913 of the right to manage the wife's separate property and the revenues therefrom, the Texas Supreme Court decided in a suit, (not for divorce) brought against the husband by his wife, that the management of her property and the control of its earnings should, because of his inefficiency and misconduct, be taken out of his hands and placed in hers, and he restrained from interfering with it, although such earnings from her separate property were then and are now community income.

In another suit[1] (not for divorce) by a wife against her husband, the Court appointed a receiver of separate property of the wife and community property of husband and wife, so that it might be handled fairly for their mutual benefit and enjoined the husband from interferring.

In another case,[2] a wife sued for divorce, and also for the protection of both her separate property and of her interest in the community estate and community income. The prayer for divorce was dismissed for want of jurisdiction, but the property suit proceeded, and therein the trial court granted a temporary injunction, which on appeal was sustained, whereby the husband was restrained "from disposing of the (community) property, from collecting the debts and from paying debts, and also * * * the banks were restrained from paying any money or delivering any property to Francisco Coss, (the husband)."

In another case,[3] it was alleged that the husband had conveyed community property with intent to defraud the wife and the Texas Supreme Court held that the wife was within the protection of the Statute prohibiting fraudulent conveyances and held that the effect of the husband's deed to Mazza was to defraud his wife of her community interest in the property. The Court said that she might have maintained a suit to declare the trust and enforce it, which would have the effect to vest the title in the community.

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[1] *Shaw vs. Shaw*, 111 S. W. 223.

[2] *Coss vs. Coss*, 207 S. W. 127.

[3] *Bicocchi vs. Casey-Swasey Co.*, 91 Texas 259.

It is true that in divorce proceedings, where the situation is such as to warrant unequal division of community property, or even the invasion of the rights of separate property of the spouses, the wife "has no assurance that she will be awarded one-half of the community property," as asserted by the Petitioner, but his statement concerning this matter is misleading unless taken in connection with the qualifying language with which we have preceded the foregoing quotation from his brief.

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The Texas Statute on the subject in part reads that the Court pronouncing a decree of divorce shall also decree a division of the estate of the spouses,

"In such a way as the court shall deem just and right, having due regard to the rights of either party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."[1]

The Statute applies equally to husband and wife. Obviously the statute is based upon social foundations. It is not confined to community property, but reaches also with equal effectiveness the separate property of each spouse.[2] It is a substitute for provisions for separate support found in the laws of some States, and for alimony found in the laws of other States, and for equitable provision for the support of children found in some jurisdictions.

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[1] Art. 4638 Texas Statutes. Appendix, page 79.

[2] *Hedke vs. Hedke*, 112 Tex. 404; *Jeter vs. Jeter*, 281 S. W. 598; *Fitts vs. Fitts*, 14 Tex. 443; *Trimble vs. Trimble*, 15 Tex. 19; *Long vs. Long*, 69 S. W. 428; *Helm vs. Helm*, 291 S. W. 648.

The warrant in the Statute just quoted from for a division of the estate of the parties in the divorce proceeding itself is not mandatory, and in the absence of some affirmative provision in the divorce decree unequally dividing community property or appropriating the separate property of one of the spouses to the support of the other or their common children, the property right of each spouse in the common property, remains an equal one-half interest and it may be immediately asserted either by conveyance, by suit for partition, or by any other proceeding open to tenants in common in every jurisdiction.[1] Unless inequality in the division of a common property was affirmatively sought and the proper basis therefor shown in the divorce proceedings, the divorce court had no judicial power to deal in any manner with the common property or to disturb the equal ownership of each spouse therein.

As a further evidence of the wife's independent title to community property, and its income, and the preservation of both, during divorce proceedings, when the common safeguards for her protection, presumed to flow from the husband's affection for her, have terminated, the Texas Statutes affirmatively provide that:

"On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time

[1] *Williamson vs. Gore*, 73 S. W. 563; *Freeman vs. Pierce*, 250 S. W. 778; *Kirkwood vs. Domnau*, 80 Tex. 645.

shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with the fraudulent view of injuring the rights of the wife."[1]

And they give to the wife at any time during the divorce proceedings, the right to exact of her husband "an inventory and an appraisement to be made of both real and personal estate, which are in the possession of the husband,"[2] and the right to obtain "an injunction restraining him from disposing of any part thereof in any manner."[2]

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It is not true, as asserted by Petitioner, that a surviving husband's responsibilities as community survivor are greater than the surviving wife's responsibilities in similar circumstances.[2]

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As community administrator and community administratrix, respectively, their responsibilities are identical, except that in the case of the subsequent marriage of the wife before her services as community administratrix are fully performed, her powers as such terminate, subject to revesture should she again become widowed while the necessity of further administration exists.[3]

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[1] Arts. 4634, 4635, Texas Statutes. Appendix, page 78.

[2] Title 54, chapter 27, "Administration of Community Property," Arts. 3661 to 3683, Texas Statutes. The analogy between the administration of community property upon the death of one spouse and the winding up of a commercial partnership is very close. *Stone vs. Jackson*, 109 Texas 385; *Leatherwood vs. Arnold*, 66 Tex. 414.

[3] *Summerville vs. King*, 98 Texas 332; as to the husband's failure to qualify as administrator, see *Akin vs. Jefferson*, 65 Tex. 137.

Otherwise, their official duties, their official responsibilities, their official powers are in all respects identical.

Petitioner perhaps has confused the husband's official responsibilities as community administrator, with the general indebtedness responsibility imposed upon him by law when, in the period of the marital relationship, a community indebtedness is created by him. For such debts, since he created the debts, he is individually responsible regardless of the subsequent death of the wife and his subsequent qualification as community administrator. In appropriate circumstances she also can subject herself personally, or be subjected to, responsibility for community debts. When that occurs, even the extra official differences in their responsibilities vanish.

No statutory or judicial compulsion rests upon either husband or wife, respectively, to qualify as community administrator or administratrix. Either, without so qualifying may handle the community estate so far as necessary to pay community debts, and without even such action on the part of either and without the qualification of either as official representative of the estate, an ordinary administrator may be appointed by the Court.[1]

In any liquidation in any character of administration of the community estate after the death of either spouse, all valid community debts created by either spouse may be enforced against the entire community estate or appropriate portions thereof as circum-

[1] *Stone vs. Jackson*, 109 Tex. 385; *Leatherwood vs. Arnold*, 66 Tex. 414.

stances warrant.[1] With or without administration, (subject to the sole qualification above stated, that the remarriage of the wife after qualifying as community administratrix interrupts her official powers) their several estates and powers with reference to the community property are identical. Each in his or her lifetime may devise his or her one-half of the community property.[2] The share of each at death is identical.[3] The nature of the title and estate which each has at the death of the other in the common property is identical.[4] Nowhere in our Statutes or decisions can be found any foundation upon which to base a contention that the wife's interest, or the interest of her heirs, differs in any respect from the husband's or his heirs.

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It is not true, as asserted by Petitioner that the husband's powers over community property and income under Texas laws are substantially as under California laws.

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As Petitioner has presented this challenge as to the substantial identity of the laws of Texas and California in the matter in controversy in connection with his citation of the decision of this Court in *United States vs. Robbins*, 269 U. S. 315, it is fair for us to presume that the laws of California as they

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[1] Art. 3661, Texas Statutes.

[2] Arts. 8281-8282, Texas Statutes. Appendix, pp. 79-80. *Parker vs. Parker*, 10 Tex. 83; *Brown vs. Pridgen*, 56 Tex. 124; *Moss vs. Helsley*, 60 Texas 426; *Rogers vs. Trevathan*, 67 Tex. 406.

[3] Arts. 2578-2579, Texas Statutes. Appendix, page 79. *McCowan vs. Owens*, 40 S. W. 336; *Clemons vs. Clemons*, 45 S. W. 199; *Edwards vs. White*, 120 S. W. 914, 916.

[4] *McCowan vs. Owens*, 40 S. W. 336.

existed when the controversy in the Robbins case arose are the laws referred to.

In his brief in the Robbins case Mr. Mitchell,[1] then Solicitor General, furnished the Court a summary of the California laws pertinent to the controversy in the Robbins case as he viewed it.

A comparison of the California laws, as there summarized, and the Texas laws, as developed in the briefs filed in this suit, discloses material differences in the two legal systems at nearly every point:

1. In Texas, the husband had not complete and absolute dominion, possession and control of the community property. Over some of it he had no dominion, control, possession, or power of disposition, and over none of it was his agency complete and absolute.

2. In Texas, portions only of the community property were subject to debts contracted by the husband. Equivalent portions were subject in like circumstances to debts contracted by the wife.

3. In Texas, the husband had no right to expend community property and income as he pleased, wastefully and for his own pleasures, regardless of his wife's rights.

4. In Texas, the restrictions on the alleged absolute ownership of community property and income by the husband are and were: Her absolute ownership of one-half thereof, coupled with the right to enjoy it

[1] See pages 4-6; Brief of the Govt. in *U. S. vs. Robbins*, 269 U. S. 315, in this Court.

while living, the right to have it on divorce, the right to devise it at will, the right to have it descend to her heirs, the right to protect it against fraudulent impairment or waste, the right to contract with reference to parts of it, the right to manage and dispose of parts of it, the right to have it exempt from his debts, the right to have it applied to her debts, the right to resort to it for her pre-marriage obligations and for her post-marriage contract obligations which the husband joined with her in making, the right to have her torts discharged from it, and many other rights discussed in detail throughout this brief.

5. In Texas, the obligation of the husband to provide for the wife's support was a personal one, but greater and different assurance for her support grew out of her right to manage and control her personal earnings, the earnings from her separate property, and by injunction or receivership to prevent gross misconduct of the husband in handling community funds. Her right to charge the entire community estate and income for necessaries was not limited to necessaries in an absolute sense, but to such support, to be determined by her in the first instance, as her social position and the common estate reasonably justified.[1]

6. In Texas, the wife in ordinary circumstances could maintain actions respecting the community income, of which she was given management and control, and in extraordinary circumstances she dis-

[1] "She herself will be the judge of what are such necessaries, subject to the condition that it must appear to the satisfaction of the Court and jury that they were reasonable and proper." Speer's Law of Marital Rights in Texas' 3rd Edition, paragraphs 176, 177.

placed the husband as the general community agent and could conduct litigation. In all cases she could be an active party to litigation and be charged with its consequences unless her coverture and her immunity from participation in the suit were insisted upon.

7. In Texas, dissolution of the community by the wife's death neither created nor terminated her ownership of an equal half interest in the common property. Prior either to her death or the husband's death her interest was not inchoate. It was vested, present, certain, fixed and definite. Ownership was in her and her husband, and not in the husband alone. She left an estate in the community property which was subject to administration. It was liable for her debts, and for expenses of administration. If the husband took it all he must take it by succession from her or by virtue of affirmative testamentary gift of it to him.

8. In Texas, whether or not the wife survived her husband she always had her one-half interest in the community property. If she survived him she succeeded to his half of the community property only after he had devised it to her or she took it as his heir at law under the Statutes of descent and distribution. She had her own half as owner.[1] She could take his half as heir. Her half at his death was never subject to State inheritance tax nor the Federal estate tax.[2] His half only was subject to such taxes and it was so subject whether she took it or it passed to other devisees or heirs.[2] At her death her

[1] *McCowan vs. Owens*, 40 S. W. 386.

[2] *Jones vs. State*, 5 S. W. (2nd) 973, Treasury Divisions 2450, 3138, Art. 7117, Texas Statutes. Appendix, p. 80.

one-half, as well as her separate estate, on passing to her devisees or heirs was subject both to the State inheritance tax and the Federal estate tax.[1] Such consequences did not proceed from special statutory arrangements, distinct from ownership, but were based upon her ownership of her interest in the community property and its passage to her devisees and heirs.[1]

9. In Texas there was no statutory restriction on gifts by the husband. Such restrictions here were based on general equitable principles which forbade his giving away property in which she was a substantial owner. Her title did not rest upon nor grow out of such equitable restraints, but was statutory and preceded the gift.

10. In Texas, on dissolution of marriage by divorce, the common property, being owned equally before divorce, remained equally the property of the separated spouses, unless, because of compelling social obligations of the spouses, the court, in the very decree itself for good cause, upon petition of either spouse made unequal distribution of it. Such power of the court did not flow from the nature of the title of the spouses to community property only, but extended in like manner to property separately owned by each.[2] We know of no case in the Texas Courts (and Federal Courts would not have jurisdiction of

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[1] The children of a prior marriage share equally with the children of the immediate marriage, and, when husband or wife dies intestate, with no children of the immediate marriage, take all of the deceased's share. *Clemons vs. Clemons*, 45 S. W. 199.

[2] There is no distinction in this respect between separate and community property. *Hughes vs. Hughes*, 259 S. W. 180.

divorce proceedings) where the wife's half interest in community property or her separate property was awarded to the husband or their children on account of her misconduct. In one case, where the wife's separate estate had been acquired by gift from her husband and at the time of the divorce he was penniless and infirm, a charge upon such separate property of the wife was made by the court to aid in the husband's support.

11. In Texas, the community property was liable for the debts of the wife contracted after marriage, except those expressly excepted, as elsewhere in this brief pointed out, and certain items of community property were liable even for those debts. The entire community property was liable for her debts contracted dum sola.[1]

12. In Texas, the entire community property and the wife's separate property was exigible for her income tax obligations to the United States and no obstacle existed which would prevent the Government from asserting its claim for income taxes against her in the same manner as its claim for income taxes against the husband. The United States could lawfully reach the wife's share of community property and community income and her separate property, because it was hers and no State barrier could effectively stop the Government's process.[2]

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[1] *Austin vs. Crim*, 6 S. W. (2nd) 348.

[2] A state could not restrict the Federal power to "levy and collect taxes." Revised Statutes, 3187 (Sec. 1016, Revenue Act of 1926) and 3186, providing for the seizure and sale of property and exempting only certain property apply—exclude state exemptions and apply to "all property and rights to property." The system has been successfully administered for ten years.

In the opinion of the Attorney General, Feb. 29, 1921,[1] denying to spouses in California the right to file divided returns of community income, (while recognizing the right of spouses in Texas so to do,) he contrasted the California and Texas situations saying:

> "As appears from my opinion of September 10, 1920, in Texas the control of community property is divided between the husband and wife. In that State on the death of either spouse without issue, the survivor takes the whole, and where there is issue takes one-half, the other half going to said issue or their descendants. Under the State inheritance law the wife pays no tax on her one-half of the community property."

This Court, in its decision in *U. S. vs. Robbins,* 269 U. S. 315, dealt solely with the California system, but obviously had in mind that in other jurisdictions quite different conclusions must be reached than were expressed in its opinion in that case. As Respondent views it, Petitioner gets no substantial support from the opinion in the Robbins case.

The controversy which culminated in the Robbins decision arose in 1918 upon the Revenue Act in force in that year. The opinion referred to *Warburton vs. White,* 176 U. S. 484 (a Washington case), *Arnett vs. Reade,* 220 U. S. 311 (a New Mexico case), and the rulings and regulations of the Treasury Department, and declared that the adoption of different rules in such other states by the Treasury Department was based upon the notion that in California the wife's interest was a mere expectancy, while deemed vested

[1] 32 Ops. Att. Gen., 435; 4 C. B. 238.

and substantial in the other jurisdictions. Neither the decisions nor the rulings or regulations of the Treasury Department, as applicable to other jurisdictions, were criticized; and primarily, the Robbins decision was based upon the concept that the California decisions, for more than sixty years, had settled the rule there to be that the wife's alleged interest in community property was a chimera; and that this Court properly should follow the settled California law, denying her any real interest in the so-called community.

The closing paragraph of the opinion in the Robbins case neither actually nor hypothetically abandoned the views expressed by the Court in the prior paragraphs of that opinion, but asserted that even if the wife "had an interest in the community income that Congress could tax," the interest was so unreal and insubstantial that Congress could tax it to the husband, as being the actual owner of it. The bulk of the paragraph was devoted to discussion of the premise that the wife's interest, if any, in community income in California, was so shadowy, so ghostlike, that Congress obviously did not intend in passing Revenue Acts to tax such income to her, but did intend to tax it to the husband, its actual and substantial owner.[1] It seems beyond argument that the opinion in the Robbins case was fitted peculiarly to the California system as then existing and was

[1] The contrary intention as to Texas is conclusively shown by the Legislative and Executive history discussed here in pages 53 to 57. In his motion to advance in the Robbins Case, the Solicitor General said: "It has been the established rule of the Treasury Department" in respect to community property in the State of Texas that the income from such property was taxable "one-half to the husband, one-half to the wife, since September 18, 1920."

not intended to control cases coming up under community systems in which the wife actually, substantially and vitally owned one-half of community property and community income. Nothing either in the brief of the Solicitor General in the Robbins case or in the opinion of this Court in that case or the necessities of the case itself, required the conclusion that this Court there attempted to lay down a general rule applying to all community property states.

The very criteria grouped in the last paragraph of the Robbins opinion as significant are absent here. As already pointed out, it was not true in Texas in 1927, and is not true now, that the husband alone had and has the disposition of community property and income, that he could and can spend it as he chooses or waste it in debauchery, the wife being without redress. It was and is not true in Texas, then or now, that the husband was the more obvious target for the tax shaft nor that the fund taxed (community income), while liable to be taken for his debts, was not liable to be taken for the wife's. It was and is not true, then or now, that the remedy for her failure to pay her income taxes might be hard to find. Whether income taxes be assessed against the wife alone or against the husband alone or against both, they were paid from the same source, community funds. Each spouse's share was diminished equally thereby.

The effect of the plan urged here by the Government would be to place a tax burden upon the husband on account of an income he does not own, but

it also would have the effect of increasing the tax burden of both husband and wife because of the progressive rates imposed under Section 211 and the surtax provisions of the Act.

Other positions adopted by the Court in the Robbins opinion vital to the decision of that case are not paralleled here. It was not true here that the wife owned no legal or substantial interest in community income. The contrary was true. It was not true here that the Supreme Court of Texas had settled the law to be that the wife had a mere expectancy. Our Supreme Court had settled the law exactly to the contrary. It was not true here that Arnett vs. Reade would not be followed. It is expressly followed. It was not true here that the commonly prevailing understanding was contrary to our contentions in this case nor that the commentators upon Texas law so stated, the Treasury Department so ruled and our courts so declared. The truth was exactly to the contrary. It was not true that the Texas laws placed the burden of income tax liability upon the husband alone. The contrary was true.

In other words, here we had a situation in which husband and wife were equal co-owners of community property, each having ownership as formally and substantially vested as ownership can be vested under our laws. Each, in like manner, owned the community income.

The wife's immunity from the income taxes under the California system and the immunity of her own

property from such taxes was grounded by this Court in its opinion in the Robbins case upon the fundamental concept that, under the California laws, she had no community income and therefore could not be taxed for it.[1]

Where, however, the wife's ownership of community income is established and vested and where, in like manner, her ownership of community property is established and vested (both of which conditions are true in Texas), all imaginable difficulties in the way of imposing the tax upon her and collecting it from her or her property are eliminated by the Federal Statutes, which provide as effective machinery for collecting the tax from her as from her husband.[2]

In *Corliss vs. Bowers*, 281 U. S. 376, there was involved no question, pertinent here, of construction of the Revenue Act, but solely the constitutionality of its language expressly imposing the tax sought there to be avoided. This Court held simply that the constitutional attack must be overruled. The decision, however, is helpful to Respondent in this case rather than to Petitioner, for there, although the income was actually being received by a trustee and had actually been paid to the beneficiary of the trust, the legal right which the creator of the trust had reserved to stop its payment to the beneficiary was held to be

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[1] In the Government's brief in the Robbins case, it was said: "The United States could not lawfully compel the wife to pay an income tax on any share of the community income, because it is not hers, but is the income and property of her husband." Brief page 6. And, on page 55, "Its (a tax on the wife) validity would have to be denied on the ground that the wife has no real interest in the income, and she cannot be rendered personally liable for the income tax on her husband's income."

[2] See foot-note, page 44 hereof.

such an interest in him as to make him the proper target of the tax. It is significant, moreover, that an express taxing provision was required to accomplish the result in that case and that until its adoption the taxing rule had been to the contrary.

Neither the Robbins decision nor the Corliss decision justifies the view that possession or control of income are the determinative basis of the incidence of the tax, nor has this Court or any other court ever held that the language of Section 223 of the Revenue Act giving to husbands and wives, at their option, the right either to file separate or aggregated returns, was impotent and must be disregarded.

After all, the foundation of the clause of the Revenue Act which was involved in the Corliss case and the foundation of the decision in that case was that, when the income there involved was actually received, the creator of the trust had not completed his gift of it to the beneficiary nor had she acquired title to it.[1] The time element was there determinative. It was his income, when received by the trustee, by virtue of the reservation.

The same considerations, when applied to community income, are controlling here. At the moment community income is received, either by husband or wife, it belongs equally to both, although one or the other, after its receipt, may violate his or her martial duty to the other respecting it and make unwarranted expenditures or unwarrantably waste it. If, at the moment of the receipt of community income,

[1] Cf. *Saltonstall vs. Saltonstall*, 276 U. S. 260.

and while it still exists in the hand of its recipient, suit for divorce were brought, the interest of each spouse in the income contemporaneously received would be admitted. If a division were immediately made each would be declared to be the owner of one-half of it. The same would be true upon division made at any time thereafter.

This Court, in the case of *Buchser vs. Buchser,* 231 U. S. 157, has emphasized the point that the time factor is of prime importance.

*Tyler vs. U. S.,* 281 U. S. 497, stated afresh the need of our keeping in mind at all times that husband and wife are separate individuals and that, even in such closely integrated property relationships as existed in tenancies by entireties under the laws of Pennsylvania and Maryland, the rights of each spouse are substantial and the death of either may create a taxable succession. Therein Mr. Justice Sutherland characterized the fiction of the common law of identity of husband and wife as an "amiable fiction," and stated that such a fiction, when a taxing act is applied to it, "seems quite unsubstantial." However, in that very case, this Court, in dealing with the highly technical and unreal conceptions of tenancies by entirties declared that the decisions of the local courts of Maryland and Pennsylvania "established a state rule of property by which this Court, of course, is bound."

Petitioner complains in this case that the titles of respondent and his wife respectively rest upon "adjectives." Without adjectives we cannot imagine

how gradations in meanings of substantives can be conveyed by human speech.

Petitioner asserts that "enjoyment" of community income is a taxing criterion, but does not attempt to define enjoyment. Respondent is at a loss as to what is meant by the term. It could hardly be said that a wife who owns community income and has the management and control of substantial parts of it, who is supported by means of it, who finds that its slow increase through savings and investment is providing for her old age, who at all times has the right to legal action to prevent its unwarranted dissipation, and who may devolve it upon her devisees or heirs at law, may not be taxed for it because she does not "enjoy" it.

It is neither necessary nor proper to seek any new test of to whom income is taxable. The statute has settled the question. "Of every individual" means "owned by every individual." Every conception of income and taxation is founded upon ownership,[1] and most attempts to disregard this fundamental conception have been declared beyond the legislative power.[2] "With respect to taxation, usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons on the property which they own, not on the property which others own."[3] The wife in Texas both owns and enjoys an equal share of community property and income.

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[1] Cf. *Hylton vs. U. S.*, 3 Dall 171; *Pollock vs. Farmers Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Eisner vs. Macomber*, 252 U. S. 189.

[2] Cf. *Knowlton vs. Moore*, 178 U. S. 41; *Lewellyn vs. Frick*, 268 U. S. 238; *Nichols vs. Coolidge*, 274 U. S. 531.

[3] *Home Savings Bank vs. Des Moines*, 205 U. S. 503.

## Fourth Contention.

**The settled departmental and Congressional construction of the identical language of the successive Revenue Acts which preceded the 1926 Act was that husbands could not be required to return nor to pay taxes upon the wife's half of community income, and such construction became a part of the Act.**

The Petitioner in his brief refers to the departmental and Congressional history of the tax laws as they relate to community income as if they were of passing or historical interest only.[1] We submit that, standing alone, this history is conclusive of the question here presented. This phase of the case is common to all of the community property income tax cases now before the Court,[2] and because of this and its importance will be covered more fully in the joint brief to be filed in behalf of all of the tax payers. We will only summarize the principal facts.

The Treasury Department had given no official recognition to community property systems until 1920. In that year the Bureau of Internal Revenue in an office decision gave partial recognition to the system and authorized divided returns of husband and wife in Texas.[3] This decision was obviously incomplete and the whole question insofar as it related to the State of Texas was referred to the Attorney General. That official ruled that, because of the equal ownership of husband and wife in community income in Texas, they were authorized and

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[1] Petitioner's Brief p. 10.

[2] Nos. 15, 84, 86, 106, Oct. Term, 1930.

[3] O. D. 429, 2 C. B., 198.

required to file separate returns and report in equal shares such income.[1] The opinion was complete. It went fully into the attributes attaching to the wife's interest and was based not only upon the express recognition of ownership by the Texas Courts in the wife, but upon the attributes and powers which she had over it.

His opinion was immediately published by the Treasury Department as the decision of that Department[2] and put into effect, not only as to the 1918 Act to which it directly related, but as to all prior Acts in situations not closed by the statute of limitations.

Shortly thereafter the Attorney General was asked to rule as to the situation in other community property States, and in 1921[3] ruled that in six states the same rule announced for Texas should be applied, but that in California, the wife did not have the same rights as in the seven other community property states.

From then until now[4] (subject only to these test cases) the Treasury Department has accepted divided returns in the seven community property States referred to and has administered the law on that basis. The Department of Justice has never receded from the position announced in the opinions

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[1] 32 Ops. Atty. Gen. 229.—Sept. 18, 1920.

[2] T. D. 3071, 3 C. B. 221.

[3] 32 Ops. Atty. Gen. 435, Feb. 26, 1921.

[4] A ruling giving recognition to the principle was made Aug. 25, 1930. General Counsel's Memorandum 8909, Int. Rev. Bulletin Vol. XI, No. 34, Page 14.

mentioned. They were, however, withdrawn in 1927 to make way for these test cases.[1]

Such in brief is the departmental history of the question.

In Congress, when the 1921 Act was under consideration, the Treasury Department urged upon Congress the "inequality", so-called, brought about by the opinions of the Department of Justice. In that Act, as it passed the House, there appeared a section, expressly relating to community property, requiring the spouse who had the control of community income to report it in a single return.[2] This change was defeated in the Senate probably as the result of a showing made that the rule was not unequal or unfair, and the 1921 law was passed with language identical, as far as pertinent hereto, with the language contained in the 1918 Act which the Attorney General had construed and which the Treasury Department had adopted as above shown.

Again in 1924 the Treasury Department recommended to Congress the adoption of the same provision which had been defeated in 1921. The new matter was contained in the original draft of the Bill, in the House but was defeated before the Bill left the House. Again Congress passed the Revenue Act with language identical with that used in the 1918 law.[3]

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[1] 35 Ops. Atty. Gen. 265, July 16, 1927.

[2] Report of Committee on Finance, page 14.

[3] For debates and actions both in 1921 and 1924. See Vol. 61, Cong. Rec. No. 140 for Oct. 27, 1921, page 6872, *et seq.* Same vol., No. 146 for Nov. 3, 1921, page 7229. Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pages 194, 348, 375, 478, 482.

No attempt was made to vary such standard provisions when the 1926 law was passed, nor to incorporate in the law anything which would require a different treatment of community income from that which had been used for the previous six years.

Such in brief is its Legislative history.

Certainly Congress, when it passed the Revenue Act of 1921 and refused to include the clause taxing community income to one spouse, knew that by using the language of the 1918 Act, it was continuing the practice begun in 1920. Congress thus knowingly and purposely said that the wife's half of community income in Texas was a part of her net income and the husband's share a part of his, and that each should make separate returns. By its conduct in 1924. Congress reiterated and again announced that it adhered to and readopted this construction. The use of identical language in the 1926 Act, coupled with uniform departmental construction and application, shows beyond all questions that Congress intended for the same language to mean the same thing. For the third consecutive time it expressly approved and adopted the views of the Attorney General as to the meaning of the acts. This construction became as much a part of the law as if set forth at length in it.

The authorities to this effect are so numerous, have been announced by this Court so many times at every term, that only a few will be cited and none discussed.[1] In not a one of them can be found stronger

1 *U. S. vs. Minnesota*, 270 U. S. 181; *Heald vs. District of Columbia*, 254 U. S. 20; *National Lead Co. vs. U. S.* 252 U. S. 140; *U. S. vs. Hermanos Co.*, 209 U. S. 339; *Copper Queen Consolidated Mining Co. vs. Arizona Board of Equalization*, 206 U. S. 474; *U. S. vs. Falk*, 204 U. S. 143; *N. Y. etc. Ry. Co. vs. I. C. C.*, 200 U. S. 361; *U. S. vs. Johnston*, 124 U. S. 236.

and more convincing evidence of Congressional intention and approval of departmental construction. Even if another construction strongly appealed to the Court, it could not be adopted without overriding the expressed will and intention of Congress.

It will be presumed that Congress in passing successive Revenue Acts, since the adoption of the Sixteenth Amendment to the Constitution, had in mind the varying property systems in effect in the several States and intended that community incomes should be taxed to their actual owners as well as that incomes of other types in other States should be taxed to their actual owners.

It has been sometimes loosely said that Congress and the Courts should view *strictly* community incomes in community property States because: (a) Such systems are excresences and abnormal; (b) perhaps are distorted and misused in order to obtain for husbands and wives in those States tax advantages over husbands and wives in common law States; and (c) the existence of such incomes was advertently overlooked by Congress in enacting tax laws.

Such critical suppositions have no statistical or other support. It cannot fairly be said that they are excresences and abnormal. Viewing the geographical range of the United States there is less reason for regarding the community system as excresences or abnormalities than there would be for so regarding common law systems or other systems in effect in other States. Geographically, the community system, in one form or another, exists throughout nearly one-

third of the territory of the forty-eight States of the Union. The States in which it is in effect are Louisiana, Texas, New Mexico, Arizona, California, Nevada, Idaho and Washington. The territory according to unofficial estimates contains nearly twenty-five million people and approximately one-fifth of the wealth of the Nation. It has been a component part of our national territory for more than eighty years, viz.: Louisiana since 1803, Washington and Idaho since 1843, Texas since 1845, California, Nevada, New Mexico and Arizona since 1848.

Historically, community property systems have been familiar social and legislative conceptions since the early centuries, during which the civil law was taking shape throughout the Roman world, and for nearly two thousand years they have been rooted in the governmental systems of most of the important nations of the world.

In contrast, the common law system is much younger, much less extended geographically and ethnologically, being virtually confined to some parts of the English speaking world, and itself has been so modified by Statutes in each separate State of our Nation as to be only approximately recognizable as a common law system.

Petitioner's position, stated in his brief, that in States having the common law, statute-modified, system as in Minnesota and in other states having the community system, Congress, in passing the Revenue Acts, intended to force the taxation of family incomes of all married persons into uniformity (Brief,

p. 7), if applied would produce interesting difficulties. The result in Minnesota would be that, although in Minnesota income from the wife's separate property is hers, the profits from her contracts and business activities are hers, compensation for her services is hers, damages for injuries to her person, reputation or property are hers, yet, because she was married, her income could not be returned by nor taxed to her, but must be added to her husband's income and be returned by and taxed to him along with his own.

If, in Minnesota, the husband is not taxed as the head of the "social and economic unit" against which the income tax is aimed, (as asserted by Petitioner) for his net income plus the income of his wife, but in Texas such aggregated incomes derived from similar sources are taxed to him alone, where is the desired uniformity visualized by Petitioner?

It cannot fairly be said that community property systems are distorted and misused in order to give husbands and wives in those States tax advantages over husbands and wives in common law States. On the contrary, *Section 223 of the Revenue Act obviously was a Congressional declaration that the Revenue Act should be applied to the varying systems of the various States and in itself was a recognition of the almost infinite variety of conditions to which the law must be applied.*

Congress never intended that State systems must be adjusted to fit the Revenue Act, but consistently has acted on the theory that the Revenue Acts must be fitted to the systems in vogue in the several States.

Moreover, it is by no means certain that the community system gives any tax advantages to tax payers in these States. In the forty states of the Union not having the community system, their own systems have been so changed by Statutes, have become modernized, individualistic systems, have adapted to their social needs such civil law and common law conceptions as joint estates, tenancies by entireties, equitable trusts, marriage agreements and settlements, gifts inter vivos, wage agreements, and the like, as automatically to create separations of incomes between husbands and wives. Collectively, they may be of more significance and influence in a particular State in dividing the gross gains of husbands and wives between them, and to make the principle of divided returns of more effective application in them, than the simpler and more uniform community systems existing in the community property states. At all events, there is as much reason for the Courts to say that the property arrangements in the forty states which have not the community system are aimed at tax evasion as to say that the simpler, more uniform, Statute regulated, two thousand years old community systems were designed for tax evasions.

It cannot fairly be said that Congress, in passing the Revenue Acts which it has passed since the adoption of the Sixteenth Amendment, was unaware of or ignored or dealt inadvertently with the community property systems in effect in such an enormous area of our territory and among such a large portion of our people. It is not imaginable even.

The eight States in question had sixteen Senators participating in the framing of those laws. Approxi-

mately one-eighth of the membership of the House were members from those States. Community incomes had been the theme of appropriate departmental rulings and regulations under the Revenue Acts for many years before the 1926 Act was passed and were the topic of several hearings before Congressional committees and the object of several Amendments proposed to Revenue Acts on several occasions. In all these circumstances the intention of Congress is not a speculative inquiry. Its intention was and is plain that, in community property States, the wife having a vested interest in community income should report it and that the husband was not obligated to report it or to be taxed for it.

**Fifth Contention.**

**It being settled law in 1927, binding upon this Court, that Respondent owned a part only of the aggregate community income received by him and his wife in that year, the taxation of Respondent upon his part thereof plus that of his wife, as contended for by Petitioner, would violate the Federal Constitution.**

The constitutional provisions which would be infringed, if Petitioner's contentions be allowed, are the third clause of Section 2, the fourth clause of Section 9 of Art. I, Section 8 of Art. I, and the Fifth Amendment to the Constitution. In that connection, it is denied that the positions of Petitioner are warranted under the Sixteenth Amendment to the Constitution.[1]

In determining how the Revenue Act under consideration must be construed, there must always be

[1] *Brushaber vs. U. P. E. R. Co.*, 240 U. S. 1, 24.

borne in mind the constitutional limitations under which Congress acted in passing it. Congress cannot make an item "income" merely by calling it "income"[1] and, since there can be no conception of taxable income except as related to a person, natural or artificial, Congress, in providing for its conception, must relate it to some person, natural or artificial. Congress must not bring its taxing enactments into conflict with the Fifth Amendment by taxing arbitrarily or capriciously, nor lay either a direct or an indirect tax without regard to constitutional limitations.

In this case a part of the income in question was derived from real estate and invested personal property. This property and its income belonged in equal portions to Respondent and his wife. Income from such property was an inseparable part and incident of the property itself. *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601. Half of the property being the husband's and half of it being the wife's, the income belonged to each in like fractions. The husband's half of the community property had as its incident his half of community income. The wife's share of both property and income was similar.

Any construction of the Revenue Act which would bring the Act itself into conflict with constitutional limitations should, if possible, avoided.[2] It is

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[1] *Eisner vs. Macomber*, 252 U. S. 189; *Taft vs. Bowers*, 278 U. S. 420.

[2] There is no more compelling rule of statutory construction. *Lewellyn vs. Frick*, 268 U. S. 238; *U. S. vs. Delaware & Hudson Co.*, 213 U. S. 366, 408; *U. S. vs. Jin Fuey Moy*, 241 U. S. 394, 401; *Harriman vs. I. C. C.*, 211 U. S. 407.

our view, in the light of this principle, that Petitioner's position to the effect that Respondent in this case should be taxed, not only for his own income from common property, but, also, should be taxed for his wife's income from common property, would violate constitutional limitations and, therefore, the Revenue Act should not be construed as so requiring, unless such ruling is inescapably necessary.

The wife's half of community income from property being an inseparable incident of the property, any tax upon her half of the income or her half of the property would be a direct tax, but such gains would not be "income" of the husband and therefore would not be exempted from apportionment by the Sixteenth Amendment. If the Revenue Act be so construed it would violate the third clause of Section 2 and the fourth clause of Section 9 of Art. I of the Constitution.[1]

If it should be decided that the nature or incidence of the tax under the circumstances was such as to cause it to be deemed an indirect tax, it would infringe the eighth Section of Art. I of the Constitution. Husbands in the community property states, because of their agency relationship to community property and community income, and because of their marital connections with the wife owning the income would be taxed, while in other states husbands situated substantially similarly would not be so taxed.

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[1] *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Brushaber vs. U. P. R. R. Co.*, 240 U. S. 1, *Eisner vs. Macomber*, 252 U. S. 189.

If it be held that Respondent could be taxed not only upon his own income, but that the income of his wife could be added to his and the aggregate taxed as one income, with the result, not only that Respondent would be taxed upon an income not his, but his income, as well as his wife's income, would be brought under higher brackets, the tax would violate the Fifth Amendment as being so arbitrary and capricious as to amount to a taking of property without due process.[1]

These constitutional objections are more fully developed in the joint brief which counsel are filing in all of the test cases. The presence of these constitutional questions, the seriousness of which were admitted in the Government's brief in the Robbins case, affords an ample reason for not adopting the construction of the Revenue Act which is urged upon this Court by Petitioner.

## IV.

## CONCLUSION.

For the reasons urged, we respectfully submit that the judgment of the trial court awarding to Respondent recovery of the taxes illegally exacted of him and the judgment of the Circuit Court of Appeals affirming the judgment of the trial court ought both

[1] *Nichols vs. Coolidge*, 274 U. S. 531; *Untermeyer vs. Anderson*, 276 U. S. 440; *Blodgett vs. Holden*, 275 U. S. 142; *Knowlton vs. Moore*, 178 U. S. 41, 77.

to be affirmed, and Respondent, accordingly, respectfully so prays.

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## APPENDIX.

### Pertinent Portions of the Revenue Act of 1926.

Section 2(a). "When used in this Act—(1) the term 'person' means an individual, a trust or estate, a partnership or a corporation * * * (9) the term 'taxpayer' means any person subject to a tax imposed by this Act."

PART II. INDIVIDUALS.

*Normal Tax.*

Section 210(a). "In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of five per centum. * * *"

*Surtax.*

Section 211(a). "In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *"

*Credits Allowed Individuals.*

Section 216. "For the purpose of the normal tax only there shall be allowed the following credits: * * * (c) * * * or in case of the head of a family or a married person living with husband or wife, a personal exemption of $3,500. A husband and wife living together shall receive but one personal exemption. The

amount of such personal exemption shall be $3,500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them."

*Partnerships.*

Section 218(a). "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, * * *"

*Individual Returns.*

Section 223(a). "The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title * * * (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband and wife; * * * (b) if a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over (1) Each shall make such a return, or (2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

**Texas Constitutional Provisions Relating to Husbands and Wives.**

Constitution of Texas (adopted 1876), Art. XVI, Sec. 15:

> "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall be passed provided for the registration of the wife's separate property."

(The Constitution of Texas may be found printed in the Official Code of 1925 or in Vernon's Annotated Revised Civil Statutes of Texas, Revision of 1925.)

## History of Texas Statutes Regarding the Property Rights of Married Women.

A brief history of Texas statutes regarding the property rights of married women is here inserted as a preface to the reproduction of the statutes themselves.

From the Act of March 13, 1848, until 1913, the statutory law of Texas provided:

(a) That all property, both real and personal, of the husband owned or claimed by him before marriage and that afterward acquired by gift, devise, or descent, as well as the increase of all lands thus acquired, should be the separate property of the husband.

(b) The wife's acquisitions from the same sources were likewise classified as her separate property.

(c) As to the wife's separate property it was provided that "during the marriage the husband shall have the sole management of all such property."

(d) All other property acquired by either during marriage was classified as common property "and during the coverture may be disposed of by the husband only."

(e) All property found in the possession of either at the dissolution of the marriage was regarded as community property until satisfactorily proven otherwise;

(f) The wife was given authority to contract debts for necessaries furnished her and her children and for expenses incurred for the benefit of her separate property, and she was given a remedy should the husband fail to support her from the proceeds of her lands, or fail to educate her children, as her fortune might justify.

(g) The community property was made liable for all their debts contracted during marriage except in such cases as were specially excepted.

The first important change in this system was made by the 33rd Legislature (Acts of 1913, Chap. 32, p. 61). By this act the following changes were made:

(a) The separate property of the husband was exempted from liability for debts contracted by the wife, either before or after marriage, except for necessaries furnished her and her children after her marriage.

(b) Express provision was made for the husband having sole control of his separate property:

(c) The wife was granted "sole management, control and disposition of her separate property" except that the joinder of her husband was required for the conveyance of her separate real estate and the transfer of stocks and the bonds belonging to her, with the proviso, in the case of his refusal to join, for a court order authorizing her to execute such instruments alone.

(d) The wife's separate property, interest on bonds and notes belonging to her, dividends on stocks owned by her and her personal earnings were exempted from the payment of debts contracted by the husband.

(e) The provision authorizing the husband to dispose of community property during coverture was amended to provide that the wife's personal earnings, rents on her real estate, interest on bonds and notes, and dividends on bonds and stock should be under her control, management and disposition alone.

(f) It was further provided that funds on deposit in a banking institution should be presumed the separate property of the party in whose name they stood.

(g) The husband's separate property and all com-

munity property except the wife's personal earnings and income, rents and revenues from her separate property were exempted from the payment of debts contracted for by the wife, except for necessaries furnished her and her children.

The second section of this Act provided "the fact that the present law denies to married women the right to manage their separate property and to make contracts is unjust to a large number of citizens in this state; creates an emergency, and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and it is hereby suspended."

By the Act of April 4, 1917, the Legislative attempted to make the following changes:

(a) The rents and revenue from the husband's separate property were classified as his separate property.

(b) The rents and revenues from the wife's separate property were classified as her separate property.

(c) The following provision was added: "The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessaries furnished her and her children, unless the husband joins in the execution of the contract. Provided that her rights with reference to the community property, on permanent abandonment by her husband, shall not be affected by the preceding sentence."

By the Act of March 15, 1915, Chapter 54; the Legislature attempted to make compensation for personal injuries sustained by the wife, her separate property except to the extent that the husband had

expended money for hospital and medical expenses, etc.

The 38th Legislature (Acts of 1923, page 338, Ch. 159) authorized a complete revision and digest of the general laws of Texas both civil and criminal. The work of the Commission appointed to carry out this revision and digest of civil laws was presented to the 39th Legislature under the title "A Bill to be entitled an Act to adopt and establish the revised civil statutes of the State of Texas." This Bill was enacted into law by the 39th Legislature on March 13, 1925; the Bill was approved by the Governor on April 21st, 1925, and took effect September 1, 1925. It is this revision which is quoted in this appendix, and which is sometimes referred to as the Code.

The case of *Arnold vs. Leonard*, 114 Texas, 535, 273 S. W. 799, which held that the attempt of the Legislature in 1917 to make the rents and revenues from the wife's separate estate, her separate property was unconstitutional both because of a defective caption and because in violation of Article 16, Sec. 15, to the State Constitution was decided on June 10, 1925. This was after the revision of 1925 had been adopted into law. That revision proceeded upon the theory that the provisions of the 1917 amendment adding to the separate estate of each spouse the rents and revenues derived therefrom was constitutional so that, in carrying out its instructions to abbreviate the law where possible, the revision merely provided that the wife should have control of her separate property instead of following more detailed language of earlier amendments.

This provision immediately followed the provision which attempted to make all of the rents and rev-

enues from the wife's separate estate her separate property.

In view of this Legislative history, it seems entirely clear that the revision of 1925 placed the rents and revenues derived from the wife's separate property, and her earnings, under her control, as had been done by the valid portions of the Acts of 1913 and 1917. *Arnold vs. Leonard*, 114 Tex. 535.

## Texas Statutes.

REVISED CIVIL STATUTES OF 1925.

TITLE 75. HUSBAND AND WIFE.

Chap. 3.—*Rights of Married Women.*

"Article 4613. *Husband's Separate Property.* All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal."

"Art. 4614. *Wife's Separate Property.* All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, the interest on bonds and notes belonging to her and dividends on stocks owned by her, shall be the separate property of the wife. The wife shall have the sole management, control and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be

necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law."

"Art. 4615. *Compensation for Personal Injuries to Wife.* All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation."

"Art. 4616. *Wife's Separate Property Protected.* Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband."

"Art. 4617. *When Wife May Convey, Etc.* If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder."

"Art. 4618. *Sale of Homestead.* The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint con-

veyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property."

"Art. 4619. *Community Property.* All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only. All the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved."

Art. 4620. *Community Property Liable for Debts.* The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law."

"Art. 4621. *Community Property not Liable.* The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision."

"Art. 4622. *Funds in Bank.* Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be

presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account."

"Art. 4623. *Subject to Debts of Wife.* Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

"Art. 4624. *Judgment and Execution.* Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff."

"Art. 4626. *Application to be feme sole.* Any married woman within this State may, with the consent of and joined by her husband, apply by written petition addressed to the district court of the county in which she may be a bona fide resident for judgment or orders of the said court removing her disabilities of coverture and de-

claring her feme sole for mercantile and trading purposes. Such petition shall set out the causes which make it to the advantage of said married woman to be so declared feme sole, and shall be filed and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her."

Chap. 4. *Divorce.*

"Art. 4634. *Debts Created After Suit.* On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife."

"Art. 4635. *Inventory and Appraisement.* At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction re-

straining him from disposing of any part thereof in any manner."

"Art. 4638. *Division of Property.* The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."

TITLE 48. DESCENT AND DISTRIBUTION.

"Art. 2578. *Community Estate.* Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive."

"Art. 2579. *Passes Charged with Debts.* In every case, the community estate passes charged with the debts against it."

TITLE 129. WILLS.

"Art. 8281. *Who May Execute.* Every person aged twenty-one years or upward, or who may be or may have been lawfully married, being of sound mind, shall have power to make a last will and testament, under the rules and limitations prescribed by law."

"Art. 8282. *May Pass Estate.* Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title and interest in possession, reversion or remainder, which he has, or at the time of his death shall have, of, in or to any lands, tenements, hereditaments or rents charged upon or issuing out of them, or shall have of, in or to any personal property whatever, subject to the limitations prescribed by law."

TITLE 65. FRAUDS AND FRAUDULENT CONVEYANCES.

"Art. 3996. *Conveyance to Defraud.* Every gift, conveyance, assignment, or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

TITLE 122. TAXATION.

Chap. Five. *Inheritance Tax.*

"Art. 7117. *Property Subject.* All property within the jurisdiction of this State, real or personal, corporate or incorporate, and any interest therein, whether belonging to inhabitants of this State or to persons who are not inhabitants, regardless of whether property is located within or without this State, which shall pass absolutely or in trust by will or by the laws of descent or dis-

tribution of this or any other State, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall upon passing to or for the use of any person, corporation or association, be subject to a tax for the benefit of the State's general revenue fund in accordance with the following classifications."

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ACTS OF 1927, 40TH LEG.

*Control of Community Property by Wife When Husband Disappears.*

Chap. 148, page 219:

"*Be It Enacted by the Legislature of the State of Texas*:

"That Article 4619, Chapter 3, of Title 75, of the Revised Civil Statutes of the State of Texas, 1925, shall be and the same is hereby amended so as to hereafter read as follows:

"Section 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall have after such twelve month period and until the husband returns to her and the affidavit

hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

"Sec. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a nonresident of this State at the time of disappearance, or of any county in which the community property or part thereof is situated, in which petition the wife shall set forth the facts entitling her to control, manage and dispose of the community property under the provisions of this article.

"Sec. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

"Sec. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall not be less than ten days prior to such date set for such hearing.

"Sec. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage and dispose of the community property under the provisions of Section 1 of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be recorded in the deed records of other counties in which the property of said community estate may be situated.

"Sec. 6. If any provision or provisions of this Act be held invalid such holding shall not affect the validity of any other provision hereof.

"Sec. 7. The fact that there is now no adequate provision for the management and disposition of community property during the disappearance of the husband, frequently working an intolerable hardship on the wife and depriving her of the fruits and benefits of community property, and resulting in the dissipation and sacrifice of the community estate through the accumulation of taxes and other expenses, and foreclosures, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three separate days in each House be suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."

# HOPKINS, COLLECTOR OF INTERNAL REVENUE, *v.* BACON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 84. Argued October 22, 1930.—Decided November 24, 1930.

The interest of a wife in community property in the State of Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband; and under §§ 210 (a) and 211 (a) of the Revenue Act of 1926, she and her husband are entitled to make separate returns, each of one-half of the community income. Following *Poe* v. *Seaborn, q. v., ante,* p. 101. P. 125. 38 F. (2d) 651, affirmed.

CERTIORARI, 281 U. S. 715, to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court, 27 F. (2d) 140, for the taxpayer in an action to recover from the Collector of Internal Revenue an amount paid under protest on account of income taxes for 1927. See statement in *Poe* v. *Seaborn, ante,* p. 101.

*Solicitor General Thacher,* with whom *Assistant Attorney General Youngquist, Mr. Sewall Key, Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Mr. Erwin N. Griswold,* and *Messrs. Clarence M. Charest,* General Counsel, and *T. H. Lewis, Jr.,* Special Attorney, Bureau of Internal Revenue, were on the brief, for Hopkins, Collector of Internal Revenue.

Under the laws and judicial decisions of the State of Texas, the husband's interest in the community income during coverture is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Texas Rev. Civ. Stats., Arts. 4619, 4620, 4621, 4623, 4634, 4635, 4638; *Moody* v. *Smoot,* 78 Tex. 119; *Stramler* v. *Coe,* 15 Tex. 211; *Coss* v. *Coss,* 207 S. W. 127; *Bell* v. *Crabb,* 244 S. W. 371; *Jordan* v. *Moore,* 65 Tex. 363; *Rowlett* v. *Mitchell,* 52 Tex. Civ. App. 589; *Briggs* v. *McBride,* 190 S. W. 1123; *Wiener* v. *Zweib,* 105 Tex. 262; *First Nat. Bank* v. *Davis,* 5 S. W. (2d) 753; *Dallas Plumbing Co.* v. *Harrington,* 275 S. W. 190; *Shaw* v. *Shaw,* 28 S. W. (2d) 173; *Martin* v. *McAllister,* 94 Tex. 567; *Ochoa* v. *Edwards,* 189 S. W. 1022, writ of error refused, 190 S. W. xv; *Braden* v. *Gose,* 57 Tex. 37; *Seabrook* v. *First Nat. Bank,* 171 S. W. 247; *Fullerton* v. *Doyle,* 18 Tex. 3; *Wright* v. *Hays,* 10 Tex. 130; *Zimpelman* v. *Robb,* 53 Tex. 274; *Hamlett* v. *Coates,* 182 S. W. 1144, writ of error refused, 190 S. W. xv; *Davis* v. *Davis,* 186 S. W. 775; *Hedtke* v. *Hedtke,* 112 Tex. 404; *Strickland* v. *Strickland,* 276 S. W. 795; *Moor* v. *Moor,* 24 Tex. Civ. App. 150, writ of error refused, 58 S. W. xv; *Gonzales* v. *Gonzales,* 117 Tex. 183; *Martin* v. *Martin,* 17 S. W. (2d) 789.

*Messrs. Harry C. Weeks* and *Palmer Hutcheson,* with whom *Messrs. Rhodes S. Baker* and *R. C. Fulbright* were on the brief, for Bacon.

Under the constitution and laws of Texas and the decisions of its highest courts, community income belongs jointly and equally to husband and wife. All acquisitions of either husband or wife during marriage, whenever or however derived, are the common and equal property of both of them, except such acquisitions as came through

"gift, devise or descent," and except the "increase" of lands so derived (that is, derived through "gift, devise or descent") and increase of lands owned at marriage or acquired subsequent to marriage through "gift, devise or descent." Texas Stats., Arts. 4613, 4614, 4619; *Arnold* v. *Leonard,* 114 Tex. 535.

It is obvious that neither husband nor wife can have any incomes other than their community incomes, except such rare gains as are "increase" of lands. Legislative attempts to enlarge the wife's separate income have been held unconstitutional by the highest courts of Texas. *Arnold* v. *Leonard, supra; Northern Texas Traction Co.* v. *Hill,* 297 S. W. 778; *Teague* v. *Fairchild,* 15 S. W. (2d) 585.

The wife has in the community income such ownership and substantial rights as authorize her under the Revenue Act, separately to return and be taxed upon her share thereof. Texas Stats., Arts. 2578, 2579, 4613, 4614, 4616, 4617, 4620, 8281, 8282; *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; *Atkins* v. *Davis,* 291 S. W. 968; *Arnold* v. *Leonard,* 114 Tex. 535; *In re Gutierrez,* 33 F. (2d) 987; *Gohlman, Lester & Co.* v. *Whittle,* 114 Tex. 548; *Tannehill* v. *Tannehill,* 171 S. W. 1050; *Taylor* v. *Murphy,* 50 Tex. 291; *Stramler* v. *Coe,* 15 Tex. 211; *Wright* v. *Hays,* 10 Tex. 129; *Zimpleman* v. *Robb,* 53 Tex. 274; *Martin* v. *Moran,* 32 S. W. 904; *Krenz* v. *Strohmeir,* 177 S. W. 178; *Watson* v. *Harris,* 130 S. W. 237; *Coss* v. *Coss,* 207 S. W. 127; *Bicocchi* v. *Casey Swasey Co.,* 91 Tex. 259; *Vercelli* v. *Provenzano,* 28 S. W. (2d) 316; *Gardenshire* v. *Gardenshire,* 172 S. W. 726; *Shaw* v. *Shaw,* 111 S. W. 223; *Dority* v. *Dority,* 96 Tex. 215; *Miller* v. *Miller,* 285 S. W. 837; *Lamar & Smith* v. *Stroud,* 5 S. W. (2d) 824; *Furrh* v. *Winston,* 66 Tex. 521; *Rice* v. *Rice,* 21 Tex. 58; *Maddox* v. *Summerlin,* 92 Tex. 483; *Pellum* v. *Fleming,* 283 S. W. 531, writ of error denied, 287 S. W. 492; *Rowlett* v. *Mitchell,* 114 S. W. 845; *Red River*

*Nat. Bank* v. *Ferguson,* 109 Tex. 287; Speer's Law of Marital Rights in Texas, 3d ed., pars. 504, 505.

Either spouse may devise during his or her lifetime one-half of the community property. Texas Stat., Arts. 8281–8282; *Parker* v. *Parker,* 10 Tex. 83; *Brown* v. *Pridgen,* 56 Tex. 124; *Moss* v. *Helsley,* 60 Tex. 426; *Rogers* v. *Trevathan,* 67 Tex. 406. The share of each at death is identical. Texas Stat., Arts. 2578–2579; *McCowan* v. *Owens,* 40 S. W. 336; *Clemons* v. *Clemons,* 45 S. W. 199; *Edwards* v. *White,* 120 S. W. 914, 916. The wife's interest, or the interest of her heirs, differs in no wise from that of the husband or his heirs.

Mr. Justice Roberts delivered the opinion of the Court.

This case comes here on writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. It involves the same questions with respect to community income under Texas law as are involved in *Poe* v. *Seaborn, ante,* p. 101, and *Goodell* v. *Koch, ante,* p. 118, under the law of Arizona and Washington.

Respondent was assessed additional income tax for 1927, because he and his wife had made separate returns and had each returned one-half of the community income, whereas the Commissioner of Internal Revenue asserted that the respondent must return the whole thereof. Respondent paid under protest, brought suit in the District Court (27 Fed. (2d) 140) and recovered judgment. The collector appealed and the Circuit Court of Appeals affirmed the judgment. (38 Fed. (2d) 651.)

In view of our decision in *Poe* v. *Seaborn, supra,* the only matter to be examined here is whether under the community property system of Texas the wife has a mere expectancy, as she would under the law of California (cf. *United States* v. *Robbins,* 269 U. S. 315), or on the contrary has a proprietary vested interest in the community

property such as makes her an owner of one-half of the community income.

The statutes contain sweeping provisions as to what shall be included in community property. They provide that each spouse shall have testamentary power over his or her respective interest in the community property. In the event of failure to exercise such testamentary power they provide that the property shall go in the first instance to the descendants of the deceased spouse. They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property (*Arnold* v. *Leonard,* 114 Tex. 535). Her interest is said to be equal to the husband's (*Wright* v. *Hays' Administrator,* 10 Tex. 130). It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other (*Arnold* v. *Leonard, supra*). These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe,* 15 Tex. 211; *Martin* v. *Moran,* 32 S. W. 904; *Watson* v. *Harris,* 130 S. W. 237; *Davis* v. *Davis,* 186 S. W. 775.)

The applicable statutory provisions are noted in the margin.*

In view of what has been said in *Poe* v. *Seaborn, supra,* it remains only to say that the interest of a wife in community property in Texas is properly characterized as a

* Revised Civil Statutes, Texas, 1925, Vols. I, II, Articles 1299–1300; 1983–1985; 2578–2579; 3661–3664; 3666–3670; 3672–3678; 3680–3681; 4613–4627; 4634–4635; 4638. Texas General and Special Laws, Reg. Sess. 1927, Chap. 148.

present vested interest, equal and equivalent to that of her husband, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate returns, each of one-half of such income. The judgment of the Circuit Court of Appeals is *Affirmed.*

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this case.